"t. In preparation for such objections the defendant had prepared several drafts of a short statement and some notes to assist him.

"u. That such drafts and notes were in his possession and in his hand when he took the witness stand
177 before the House Committee on Un-American Activities on February 6, 1947.

"v. That he was prepared to state his objections from these drafts and notes within the three minutes which he requested of the committee.

"w. That defendant did not intend, if time to state his objections had been allowed, to read before being sworn the long statement which he had previously prepared for use before the committee.

"x. That after being allowed three minutes for his objections defendant—if the committee still demanded it—was ready to be sworn and to answer pertinent questions put to him by the committee.

"y. That notwithstanding the illegality of his arrest, transportation and appearance before the committee that the defendant had no intention of making default wilful or otherwise on any obligation imposed upon him by Section 192, of Title 2, U. S. Code.

"Fifth Offer of Proof

"The defendant contends as a defense to the indictment that he was under no obligation to appear and testify because the Committee was abusing its power of subpoena for purposes beyond it power; this Court should not permit its processes and functions to be used in aid thereof, and in support of this contention the defendant offers to prove the following:

178 "a. That each of the members of the House Committee on Un-American Activities and the Committee as a whole did not call the defendant before its hearing on February 6th in aid of the legislative process or because the committee wished to obtain his testimony, but did, in

fact, call him before the said hearing for the following reasons:

"1. to harrass and punish him for his political beliefs,

"2. to prevent his departure from the United States and his return to Germany,

"3. to cause the prosecution of the defendant by the Department of Justice for alleged perjury and other alleged crimes, and

"4. to intimidate the defendant and others.

"b. That in aid of the Committee's steps to hound and prosecute the defendant because of his political beliefs, the Chairman or other representative of the said Committee requested and arranged with the Attorney General and other representatives of the Department of Justice to have the defendant arrested and kept in custody.

"c. That the present proceeding is a result of this Committee's campaign to harass and persecute the defendant because of his political beliefs.

"d. That at no time was the Committee interested in obtaining any testimony from the defendant except in-
179 sofar as it might urge, on the basis of such testimony, the prosecution of the defendant for alleged perjury or alleged other crimes, or might in other ways harass and persecute the defendant."

180 Mr. Hitz: Your Honor, may we come to the bench on the last request made by Mr. Isserman?

The Court: Yes, indeed.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. Hitz: It is my understanding that the Court has ruled that he may refer to the papers that were brought by Hisler to the hearing. I assume that one of those papers will be the so-called 3-minute statement. In view of the contents of that statement, I wish to object to any reference being made to its contents.

The Court: Of course, I do not know what the contents of the statement are.

Mr. Hitz: I do.

The Court: Of course, my practice is not to acquire any knowledge of the pending case except what is offered in court. Now that this matter is brought up, I would be very glad to have you state what is in the 3-minute statement.

Mr. Hitz: I think it is fair to say, since the word has been used many times before, that it is some more Communistic propaganda largely devoted to attacking the Un-American Activities Committee.

181 The Court: I am going to exclude the statement, of course.

Mr. Hitz: The fact that he had—

Mr. Isserman: But that is only the District Attorney's statement.

The Court: If that summary is accurate.

Mr. Isserman: I would like to take issue with his statement and ask him the source of his information.

The Court: No; one counsel may not ask questions of another counsel. Do you deny that that is an accurate statement?

Mr. Isserman: I do deny that it is an accurate statement. Is the Court requesting me to state now what the statement contains?

The Court: I will be very glad to have you do so.

Mr. Isserman: Does the Court desire me to do so?

The Court: No. I will be glad to have you do so if you choose; I am not going to require you to do so.

Mr. Isserman: It is our position that whatever he tried to say in those three minutes goes purely to the question of his intention and wilfullness. I intend to summarize the statement before the jury.

The Court: Then, I shall not permit you to summarize it until you tell me, first, what is in it.

Mr. Isserman: In response to the Court's request—

The Court: I made no request; I made a ruling
182 that I shall not permit you to summarize the statement until you tell me—

Mr. Isserman: Then, may I say in view of the Court's ruling I wish to say that the defendant, in the 3-minute period, did not have a written statement which he wanted to read, but he intended to make objections to being sworn in, based on what he believed to be his unlawful arrest, detention, and transportation to Washington, based on the fact that he believed that being in custody—as he termed it, a political prisoner, but in fact as an interned enemy alien—he was not required to be sworn, and that he was also going to state the political motivation which he believed was responsible for this illegal activity or activities, and that he believed that the chairman of the committee and the committee members had brought him down in this fashion for ulterior purposes.

The Court: Well, now, I am going to permit you to show everything up to what you call the political motivation. I think if what he wanted to do was to object to the legality of the proceedings, even though his method was ill-advised, I am going to allow it in as going to the issue of wilfullness. But when his statement goes to attacking the motives of the committee or its purposes, that I consider beyond the scope of the issues.

Mr. Isserman: I should like to call the Court's
183 attention to the fact that part of the illegality was what he deemed to be the abuse of process by the committee chairman.

The Court: I shall exclude that, because the courts have held, as I view the law, that an erroneous view of the law on the part of a witness, no matter how bona fide, does not excuse him.

Mr. Isserman: Of course, he was referring to matters of fact which applied to him, as far as the committee's treatment of him was concerned.

The Court: No. If good faith was an issue, I would admit it; but I regard good faith or bad faith as not an issue and

as not comprising the term willfulness. Therefore, I shall not admit it; but those earlier parts of the statement I shall admit, because I think they go to willfulness.

However, I am going to instruct the jury that even if he acted in good faith and under an erroneous view of his rights, that would be no defense if his action was deliberate and intentional, because willfulness I construe as a deliberate and intentional act, within the meaning of the statute, even if it is in good faith or through an erroneous view of the law.

Mr. Isserman: I understand there is no need to object to any of your Honor's rulings?

The Court: No. Under the Federal Rules of Criminal Procedure you do not have to note exceptions, just so long as you once indicate what it is on which you request
184 the Court to rule.

Mr. Hitz: I have one further thing to say on that. It is the position of the Government that even if his objection was going to be to the legality of the proceeding—which is what the Court has limited his statement to—that that—

The Court: When I say legality of the proceedings, I mean legality of the committee proceedings.

Mr. Hitz: Yes, as distinguished perhaps from the resolution or anything else—that that goes to the good faith rather than to the deliberate and intentional nature.

The Court: I think there is a great deal of merit in your position, but I think there is just enough doubt in that to warrant my construing the matter in favor of the defendant and admitting the evidence.

* * * * * * * * * * *

186 Mr. Hitz: The fact is that Eisler never did make any claim as to the legality of the proceeding other than that he said he was a political prisoner, for what that is worth. Now we are about to go into something he intended to say, when the fact is he did not say it, nor did his counsel say it.

Mr. Isserman: He was not allowed to say it.

Mr. Hitz: Presumably he was permitted to make his legal objections.

The Court: He said, "I want to make a 3-minute statement." If he had said, "I object to being sworn, and I want to note my objections," we would be confronted with a different situation. But I am not ruling on that
187 situation, because that is not here.

Mr. Isserman: If a layman states that he wants to make a few remarks before he is sworn, it would seem to me that in any procedure they would at least ask him and inquire the nature of the remarks he wanted to make.

The Court: The layman had counsel.

Mr. Isserman: Before a Congressional committee a lawyer is not allowed to talk.

Mr. Hitz: Finally, I think the statement does not amount to an objection; and since it does not, it is clearly beyond the matter of good faith—rather the matter of—

The Court: That may be so, but I think I will allow that narrow bit of evidence in, because I have some doubt about it; and I think in case of doubt I would rather let the defendant make his record.

Mr. Isserman: As I understand it, I may ask this question, because I want to remain within the Court's ruling to the maximum extent possible; that I may commence with his arrest on February 5?

The Court: Yes.

Mr. Isserman: And the events which brought him to Washington?

The Court: Yes, you may do that.

Mr. Isserman: His arrest on February 4. Or does your Honor mean I must commence with—

188 The Court: You may start with his arrest.

. . . . . .

(Counsel returned to the trial table, and the following occurred:)

Opening Statement on Behalf of the Defendant (Resumed).

Mr. Isserman: Under the instructions of the Court, my opening remarks on what we shall show will be considerably curtailed. I shall merely confine myself to these remarks, which the Court has permitted me to make.

The defendant in this case was arrested on February 4, 1947, under a Presidential warrant and under that warrant was interned as an enemy alien at Ellis Island.

On February 5, 1947, while in custody at Ellis Island, two officers, known as security officers of the Department of Immigration, came to the place of the defendant's detention and stated that he was to be taken to Washington. Late that afternoon he was taken by those two officers to Washington and that evening was put into the County Jail.

The next morning he was taken by the same two officers from the County Jail to an office of the Immigration 189 Service, and there he met his counsel, Mrs. King.

He was allowed to confer with Mrs. King for only a few minutes and in the presence of one of the security officers of the Department of Immigration.

He was then taken to the hearing room of the Committee on Un-American Activities and was brought into that room by these two security officers of the Department of Immigration. He was under their custody throughout the proceedings which occurred in that room; and when the proceedings, insofar as they affected him personally, were over, he was taken from that room by the same two security officers of the Department of Immigration.

Now, the defendant after he received his subpoena on January 24, and of course before he was arrested, made certain preparations in connection with his coming down to Washington to testify. We will show that included in those preparations were, one, the preparation of a rather lengthy statement which he had been advised by his counsel he would be allowed to present to the committee.

We will show also that in addition to this preparation, he had reserved—made arrangements for the reservation

of—hotel rooms in Washington, which reservations were completed, I believe, by February 3; and also on that date he had asked his wife, Mrs. Eisler, to purchase the railroad tickets which would take them to Washington. We
190 will offer into evidence in this case, the Court permitting, those railroad tickets bearing the date February 3.

He was all prepared, then, to go to Washington to appear before the committee on February 6.

Now, when he was arrested, and when he conferred with his counsel, he was advised by his counsel that his arrest and detention and transportation to Washington were against the law, and he was also advised that he could at the hearing, and before being sworn, object to what he believed was the unlawful arrest, detention, and transportation; and he was told also that if he did not object before he was sworn, he might lose any rights that he had.

When he was called to take the witness stand and he was asked to be sworn, he asked not for the right to read a lengthy statement—that is, the long statement which he had prepared before—but he asked for the right to make a few remarks, and in those remarks—and he will testify as to what he intended to say—he was going to say that his arrest and his detention and his transportation to Washington by guards were not in response to any subpoena at all but was an unlawful act or series of unlawful acts; that those unlawful acts were participated in and instigated by the chairman and by members of this Committee on Un-American Activities; and that, therefore, he was not appearing in response to a subpoena but because the committee had caused his arrest.

191 He desired to state those objections, and then he wanted to go further and explain the reasons for those objections; but I may not summarize those reasons here under an instruction from the Court. But the fact is that all he wanted was to be allowed three minutes to declare what his rights were and if the committee chair-

man would then have ruled against him and said, "We have heard your remarks, we have heard your objection" —as we lawyers would call it— "and we rule against your objection," then, after that passage of three minutes, the witness was ready and willing to answer questions that would be put to him and also to put into the record the long statement, about which there has been some discussion before you.

We will show, not only from his testimony but from the record which has already been, in part, read to you, that there was nothing willful about this defendant's actions, and that it would have taken a three-minute period to have cleared up the whole situation and to have allowed the committee chairman to ask him any questions which under the law they were allowed to ask and which under the law he would have been required to answer.

Now, it is our position that upon presentation of these facts to you, they will clearly indicate that there was nothing willful at all about the alleged refusal of this defendant to be sworn, as it is charged that he refused to be sworn, to testify.

192 **Arthur J. Brosnan**

* * * * * * * * * * * *

Direct Examination

By Mr. Isserman:

* * * * * * * * * * * *

Q. Mr. Brosnan, what is your occupation? A. I am employed by the United States Department of Justice as an Immigration and Naturalization security officer.

* * * * * * * * * * * *

193 Q. In your capacity as security officer for the Department of Immigration and Naturalization, were you given any instructions on or about February 5, 1947, in respect to one Gerhart Eisler? A. Yes, sir.

The Court: Mr. Isserman, are you trying to prove by this witness that the defendant was brought to the hearing

in custody? I thought that fact was admitted by stipulation.

Mr. Isserman: I am trying to prove by this witness, and another witness, that this defendant was brought to the hearing in illegal custody, and I want to indicate the nature of the orders under which he was brought to the hearing room, the circumstances surrounding his being brought to the hearing room —

The Court: I am going to exclude that as being irrelevant. If you wish to protect the record in that respect, you may make an offer of proof as to what you expect to prove by this witness. Our usual custom or practice is to make offers of proof at the bench.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: What do you expect to prove by this witness?

194 Mr. Isserman: If the Court please, does the offer of proof in this case have to be limited to this witness?

The Court: Yes.

Mr. Isserman: Just what we would prove by this witness?

The Court: Yes.

Mr. Isserman: We would prove by this witness, as part of our proof, that the defendant was unlawfully arrested on February 4, 1947.

The Court: Tell me what you offer to prove by this witness.

Mr. Isserman: That this witness had received instructions from a superior officer to bring the defendant to Washington, D. C., for this hearing, and that those instructions were the result of a letter sent on January 31, 1947, by J. Parnell Thomas, Chairman of the House Committee on Un-American Activities, to Attorney General Tom Clark.

The Court: I do not suppose you could prove that by this witness, could you?

Mr. Isserman: Well, I might be able to prove it by this witness. Further, we would prove by this witness the names of the superior officers under whom he received his instructions.

Mr. Hitz: I think that you are speaking a little loud.

The Court: Not so loud. The purpose of this is to make your offer of proof out of the hearing of the jury.

Mr. Isserman: The sources of those instructions;
195 and the final conclusion or final evidence that the defendant was transported to Washington, D. C., by this witness under no legal order whatsoever.

The Court: Do not argue; tell me what facts you have.

Mr. Isserman: That there was no order for his appearance in Washington, D. C., before the House Committee on Un-American Activities on February 6, 1947, and that the instructions the defendant had received he received as a result of a letter addressed to the Attorney General.

The Court: You have said that once before.

Mr. Isserman: I had not finished; I was interrupted before I had completed my statement as to that letter.

That as a result of the letter which Mr. Thomas had sent to the Attorney General, the defendant was arrested as an enemy alien and held for the purpose of bringing him to Washington before the Un-American Activities Committee on February 6.

The Court: As the Court understands it, there has been a stipulation to the effect that on or about February 4 the defendant was arrested and interned by the Immigration and Naturalization service as an enemy alien, and that he was brought before the committee in the custody of representatives of the Immigration and Naturalization Service. This being already in the record, any proof of those facts would be cumulative.

All of the other matters contained in the offer of
196 proof are irrelevant and will be excluded.

Mr. Isserman: May it please the Court, I do not recall that there was any stipulation in respect to the

method of the defendant's arrest. I was under the impression from Mr. Hitz that he was to advise the Court on the method of arrest.

The Court: What was the stipulation made yesterday?

Mr. Isserman: Merely that he was in custody at the hearing.

The Court: I am sure that counsel will stipulate that.

Will you stipulate that, Mr. Hitz, if you have not already done so?

Mr. Hitz: That the custody was in the Immigration authorities both before and after the hearings.

The Court: Yes, pursuant to a warrant interning the defendant as an enemy alien.

Mr. Hitz: I will stipulate that except as to the word "interned." He did not become interned and never has been, but he was detained and held.

The Court: Detained.

Mr. Isserman: We cannot agree to the stipulation, because it is our understanding that he was interned.

The Court: No; "interned" is a legal conclusion. There was a period of detention before the interning. Anyway, that is a conclusion of law, and you cannot get it out
197 of this witness, I presume.

I am going to exclude all other matters except those that I stipulated.

Mr. Isserman: We will except.

The Court: Irrespective of whether we call it "detained" or "interned," he was in custody as an enemy alien.

Mr. Hitz: Immediately before and immediately after or at the time of departure from the hearing.

The Court: Well, I suppose he was in custody at the hearing.

Mr. Hitz: I am prepared to stipulate that he was in custody during the hearing as well.

Mr. Isserman: I accept that stipulation; but, of course, it does not preclude me from asking questions dealing with the witness on the morning of February 6?

The Court: Of course, any supplemental matter you may inquire into; but I will not permit you to offer cumulative evidence on the points already conceded.

Mr. Isserman: There will be no need of doing that if it is not in controversy.

The Court: But I shall exclude everything in the offer of proof for the reasons stated.

Mr. Hitz: I do not think the legality of the detention, insofar as this officer knows anything about it, is in
198 issue here. I think the ruling is that—

The Court: I am going to rule that the legality or illegality of the detention is irrelevant. The fact of the detention is already in the record.

Mr. Isserman: I still am under the duty to present every fact which we deem goes to the legality.

The Court: You may ask any questions you choose, and I shall rule on them.

Mr. Isserman: I understand.

(Counsel returned to the trial table, and the following occurred:)

The Court: Proceed.

By Mr. Isserman:

Q. Mr. Brosnan, when you took—Did you on February 4, 1947, take the defendant, Gerhart Eisler, into custody? A. That is right.

Q. Who was with you, if anyone, at that time? A. Security Officer Stephen Greenman.

* * * * * * * * * * *

199 Q. When you took the defendant into custody, did you show him any paper of any kind?

The Court: I shall exclude that for the reasons stated at the bench.

By Mr. Isserman:

Q. What did you do with the defendant when you took him into custody? A. We left on the 4:30 train leaving

Pennsylvania Station and arrived in Washington, and from there we took him to the Washington District Jail here.

Q. Did you stay with him after you took him to the Washington District Jail? A. We filed a detainer on the Presidential Order and left him in the custody of the District Jail here in Washington.

Q. When did you next see the defendant? A. Around 7:30 the following morning.

Q. What did you do with the defendant when you saw him that morning? A. From there we took him back to the Immigration station here in Washington, where we met Mrs. King, and then we proceeded—

Q. When you took him back to the Immigration station in Washington, what time of the morning was that?

200 A. Around 8:30.

Q. Was Mr. Greenman with you still? A. That is right.

Q. Did you meet Mrs. King at the Immigration station? A. Yes, we did.

Q. Did Mrs. King ask you for permission to speak to Mr. Eisler? A. Yes.

Q. Did you give that permission? A. It was not my authority to give that permission.

Mr. Isserman: May I get that answer?

(The last answer was read by the court reporter.)

By Mr. Isserman:

Q. Did Mrs. King speak to Mr. Eisler in your presence? A. Yes, she did.

Q. At all times that morning were you presence with Mr. Eisler wherever he was? A. Yes, I was.

Q. Was Mr. Greenman present with you and Mr. Eisler at every place and at all times that morning? A. Yes.

Q. When Mrs. King was talking to Mr. Eisler, you and Mr. Greenman were present, were you not? A. That is right.

Q. Was that conversation which Mrs. King had
201 with Mr. Eisler in a room in the office of the Department of Immigration? A. That is right.

Q. Was it a large room, Mr. —

The Court: What difference does it make whether it was a small or a large room?

Mr. Isserman: Well, if the Court please, it may make a difference.

The Court: Let us not go into these minutiae. I am going to exclude that question.

Mr. Isserman: May I state—The Court has already ruled?

The Court: Very well; state what difference it makes whether the room was large or small.

Mr. Isserman: It will show the lack of privacy Mrs. King had in talking to Mr. Eisler. If that will be stipulated, we will not need to ask him about it.

The Court: Well, is there any dispute over the fact that the conference between Mrs. King and the defendant was conducted in the presence of representatives of the Immigration Service?

Mr. Hitz: I have no knowledge of it, nor of the room it was in. I do not know.

The Court: I do not think it makes any difference what room it was in.

Mr. Isserman: I did not ask what room; I asked for the size of the room. Perhaps I can put the question differently.

202 The Court: Let him answer the question; it will save time.

The Witness: I don't know the size of the room.

By Mr. Isserman:

Q. But you were pretty close to Mr. Eisler during this whole period, were you not? A. About 8 feet away.

Q. Mr. Greenman was about the same distance away? A. That is right.

Q. How long did Mrs. King stay with Mr. Eisler? A. I would say about an hour.

Q. In that entire period, you were there too? A. That is right.

Q. And so was Mr. Greenman. Now, after Mrs. King left, what did you do with Mr. Eisler? A. We escorted him back to the Committee on Un-American Activities.

Q. You took him to the hearing of the Committee on Un-American Activities, did you not? A. That is right.

Q. In the entire time he was at the hearing, he was in your custody, was he not? A. That is right.

Q. Now, in the course of the hour which Mrs. King spent with Mr. Eisler, didn't you spend a good deal of that
203 hour with Mr. Eisler in taking him where he could be washed up and put in presentable condition for the hearing? A. That is right.

Q. That was a substantial part of the hour, was it not? A. I would say about 15 minutes of it.

Q. And Mrs. King was not there at that time? A. That is right.

Q. Is that correct? A. That is right.

. . . . . .

Steve Greenman

. . . . . .

207 Cross-Examination

By Mr. Hitz:

Q. Is your answer that you don't remember what you heard said between Mrs. King and Eisler, or that you don't remember whether you heard anything? A. I know they were talking. I could hear them talking, but I just couldn't remember the words that were spoken.

Q. Did you hear the words at that time? A. No, sir.

. . . . . .

209 **Reginald Parker**

Direct Examination.

By Mr. Isserman:

Q. What is your occupation, Mr. Parker? A. I am assistant—associate professor of law in the Columbus University of Washington, D. C.

Q. What subjects of law do you teach there? A.
210 I might say the general common law subjects I have been teaching so far there, like torts, contracts, wills, equity—

The Court: I do not think we need to go into those details.

By Mr. Isserman:

Q. Have you any information in a professional sense as to the law of Germany and the law of Austria pertaining to nationality? A. Yes, by all means, sir. I may add why.

The Court: No, it is not necessary.

Mr. Isserman: Unless the qualifications are admitted, I should like to ask the witness to state his qualifications as an expert in German and Austrian law, particularly on the law of nationality.

The Court: Is there any question about his qualifications?

Mr. Hitz: I have never seen this gentleman before. I do not know of his reputation; I am sure it is good.

The Court: Very well.

By Mr. Isserman:

Q. Will you please state your qualifications as an expert on the German and Austrian law of nationality? A. I will be very brief. I want to say despite the fact I was born in New York I spent most of my life in Vienna and practiced law there for about 8 years. Nationality cases were

211. frequent, involving Germans, Austrians, Czechoslovaks, and so forth, and many of them came to my attention and professional care; and I am also now—in this country I have always tried to be professionally specialized in international law, but it has time and again led me into questions of nationality, foreign and American.

Q. What is the German law of—

Mr. Isserman: I withdraw that question.

By Mr. Isserman:

Q. Mr. Parker, are you familiar with the state of the law of nationality in Germany? A. Yes, sir.

Q. Particularly with reference to the year 1897? A. 1897? Yes.

Q. Under the German law of nationality in that year, what was the nationality of a person born in Germany of parents who were Austrians?

The Court: I should like to know what the relevancy of that question is to the issues of this case. Tell me in a sentence or two what is the relevancy of this.

Mr. Isserman: The relevancy of this is to show that the defendant's arrest on February 4, 1947, under an alleged Presidential warrant as an enemy alien was unlawful, in that the defendant never was an enemy alien.

The Court: The testimony will be excluded as ir-
212 relevant to the issues of this proceeding.

Mr. Isserman: I should like at this time to make the following offer of proof.

Mr. Hitz: Which one of your offers is it?

Mr. Isserman: That is item E in my third offer.

The Court: The offer of proof must be limited to what you expect to elicit by this question.

Mr. Isserman: That is what I expect to do.

The Court: Very well.

Mr. Isserman: That under the law of both Germany and Austria the defendant was a native of Austria and not a native of Germany.

The Court: The question will be excluded.

Mr. Isserman: Just a minute, please. And also, if the Court please, the further fact that the defendant was a citizen of Austria, not a citizen of Germany.

The Court: That also will be excluded.

213 **James M. McInerney**

Direct Examination
By Mr. Isserman:

Q. Mr. McInerney, what is your occupation? A. I am First Assistant in the Criminal Division in the Department of Justice.

215 Q. Mr. McInerney, do you have with you a copy of the communication, I mean the original communication sent by J. Parnell Thomas to the Attorney General dated January 31, 1947, relating to the surveillance of Gerhart Eisler and his appearance before the House Committee on Un-American Activities on February 6, 1947?

216 A. I do, sir (witness produces document).

Q. And this letter was officially received by the Attorney General? A. That is correct.

Mr. Isserman: At this time I would like to offer as exhibit on behalf of the defendant a letter signed by J. Parnell Thomas, Chairman of the Committee on Un-American Activities dated—

Mr. Hitz: You are not going to read it, are you?

Mr. Isserman: Dated January 31, 1947, addressed to Honorable Tom C. Clark, Attorney General, Department of Justice, Washington, D. C.

The Court: Have you seen it?

Mr. Hitz: I know the contents of the letter and I object to it as not material to the case.

The Court: The objection is sustained. The letter is irrelevant to any of the issues in this case.

Mr. Isserman: May the letter be marked for identification?

The Court: Oh, yes.

(Letter dated January 31, 1947, from J. Parnell Thomas, Chairman, to the Attorney General of the United States was marked Defendant's Exhibit No. 1 for Identification.)

* * * * * * * * * * *

217 Q. Mr. McInerney, do you have with you the Presidential warrant of arrest dated February 4, 1947, signed by the Attorney General for the arrest of Gerhart Eisler as an enemy alien? A. I believe that is included among the documents which Mr. Rothstein is bringing over.

The Court: Now, I may state to save time that I do not consider that relevant because the fact of the arrest is stipulated in the record and, therefore, it would be purely cumulative to offer the warrant.

Mr. Isserman: We believe the terms of the warrant are important.

The Court: Why?

Mr. Isserman: Because they indicate that the defendant was arrested as an enemy alien.

The Court: I think that is admitted. I understand
218 Mr. Hitz admitted that the defendant was taken into custody as an enemy alien. Is that correct?

Mr. Hitz: That is correct.

The Court: So you do not need the Presidential warrant.

By Mr. Isserman:

Q. Do you have with you, Mr. McInerney, the record, or records, of service of said warrant showing the time and place served, and by whom? A. No, sir, I do not.

The Court: I am going to exclude that for the same reason.

Mr. Isserman: If Your Honor please, we would like to make an offer of proof in respect to that, and other information we are asking of this witness.

The Court: The fact that the defendant was arrested pursuant to a warrant as an enemy alien, and was taken into custody on that ground is admitted in this case. Now, what else do you want to bring along that line? I am going to exclude any evidence which you tender which in any way questions the legality of the arrest, because that is not in issue in this case.

Mr. Isserman: If Your Honor rules it out on the second ground, I would like to state to Your Honor the reason why we think it is relevant.

The Court: Why?

219 Mr. Isserman: We intend to show that at the time of the arrest of Mr. Eisler he was not served with any warrant whatsoever, and the time and place of the service of the warrant and the record which the Attorney General has to that effect.

The Court: I am not interested in that. I will exclude it. The fact of the arrest is admitted. How the arrest was accomplished is immaterial, and whether it was legal or illegal is also immaterial. Bear in mind the only issue—Mr. Isserman, I am calling your attention—bear in mind that the only issue in this case is whether the defendant was guilty of default during his appearance before the Committee, and whether that default was wilful, and everything else is extraneous.

Mr. Isserman: If the Court please, we understand that is the Court's ruling, but we would like to make an offer of proof of other matters we deem material.

The Court: Proceed; but in order to make the record, Mr. Isserman, on matters the Court has excluded you do not have to offer cumulative testimony.

Mr. Isserman: As to that feature of the testimony I would like to approach the bench and indicate to Your Honor what we intend to prove under these defenses, and if Your Honor will rule—

The Court: Oh, no, I won't let you do that. I will
220 rule on questions of evidence as we go along.

Mr. Isserman: That is what we are endeavoring to do.

The Court: I have already ruled on the Presidential warrant. I have excluded that, and the manner of the arrest, and whether the warrant was or was not served.

By Mr. Isserman:

Q. Now, Mr. McInerney, I ask you if you have with you documents and reports showing, or from which it can be ascertained, the number of names of any and all enemy aliens arrested on and after January 1, 1947, to date as "dangerous to public peace and safety of the public peace" pursuant to Presidential Proclamation No. 2526 dated December 8, 1941? A. I understand there were none except Mr. Eisler.

Q. Mr. McInerney, I ask you whether you have with you copies of instructions issued by the Attorney General, or his subordinate, with reference to the entrance, deportation and treatment of enemy aliens issued subsequent to July 20, 1945? A. I do not, sir. That is included among the material Mr. Rothstein is producing.

Q. I will ask you if you have in your possession record of the order of release of Mr. Eisler obtained on Presidential warrant dated on or about April 15, 1947? A. I didn't hear the first.

Q. I am sorry, the order of release from custody of Gerhart Eisler as an enemy alien detained on Presi-
221 dential warrant dated on or about April 15, 1947?

Mr. Hitz: The question is do you have such an order?

The Witness: I have such an order, yes.

Mr. Isserman: May I see it, please?

(Witness produces document.)

Mr. Isserman: May I have the telegram dated April 12, 1947, addressed to the Honorable John F. McGohey, United States attorney, U. S. Court House, New York, signed—

The Court: Don't go into all those details.

Mr. Isserman: I want to identify the telegram.

The Court: Just identify it briefly.

Mr. Isserman: I am going to give the—

The Court: Don't tell me that, just identify it briefly.

Mr. Isserman: I am trying to do as Your Honor tells me.

The Court: The Court has the last word.

Mr. Isserman: I shall complete the identification by indicating that it is signed by Tom C. Clark, Attorney General.

The Court: Are you offering it in evidence?

Mr. Isserman: I now offer Defendant's Exhibit No. 2, for identification, in evidence.

(Telegram dated April 12, 1947, to John F. McGohey was marked Defendant's Exhibit No. 2 for Identification.)

Mr. Hitz: I object to it.

The Court: Objection sustained.

222 Mr. Isserman: I would like to make an offer of proof, if Your Honor, please.

The Court: You don't need to make an offer of proof when it is marked for identification; that protects the record. Proceed.

Mr. Isserman: May I see the exhibit, please?

The Court: I beg your pardon, ask the next question.

Mr. Isserman: I want to examine the exhibit for a minute, if I may.

By Mr. Isserman:

Q. Mr. McInerney, I now ask you if you have with you all applications to extend time of temporary stay on Form I-539063 executed by Gerhart Eisler between August 6, 1941, to the present date, returned by him to the Immigration and Naturalization Service, which are in File No. 56088411? A. I have, sir.

Q. May I examine it, please? A. I will have to remove them from the file.

Q. Will you do that, Mr. McInerney, please?

223 Q. Mr. McInerney, do you have with you now the documents I requested just before the recess? A. I do.

Q. May I have them, please? A. (Witness produces papers.)

Mr. Isserman: At this time I would like to mark for identification as Defendant's Exhibit No. 3, Form I-539, United States Department of Justice, Immigra-
224 tion and Naturalization Service, entitled "Application to Extend Time of Temporary Stay," District No. 9—

The Court: You don't have to identify all that.

Mr. Isserman: There is a great deal of it.

The Court: The exhibit number will be sufficient for identification.

Mr. Isserman: But there are many with the same exhibit number—oh, I see.

The Court: I mean the Clerk's exhibit number will be sufficient.

Mr. Isserman: Correct. I think the date should be mentioned, if Your Honor please.

The Court: The exhibit number is sufficient.

(Form I-539 of the Immigration and Naturalization Service was marked Defendant's Exhibit No. 3 for Identification.)

Mr. Isserman: I would like now to offer—

The Court: Just a minute, I have not approved it.

Mr. Isserman: I thought I would mark a series of these for identification.

The Court: No; are you offering this?

Mr. Isserman: I am offering Defendant's Exhibit 3 for identification in evidence.

The Court: Does the Government wish to be heard?

Mr. Hitz: I object as irrelevant.

The Court: Objection sustained. This exhibit is
225 irrelevant to any relevant issue in this case.

Now, then, have you any more of these papers you wish to offer?

Mr. Isserman: I have more of these papers bearing on different dates and containing other items of information which we deem material and relevant to the issues in this case.

The Court: How many of them are there?

Mr. Isserman: There are six, Your Honor.

The Court: They are all excluded and they will be marked consecutively as Defendant's Exhibit 4 for identification, and so on, and the Clerk can mark them at his convenience and in the meantime you may proceed.

(Documents from the Immigration and Naturalization Service were marked Defendant's Exhibits 4, 5, and 6, for Identification, respectively.)

* * * * * * * * * *

226 Q. Now, Mr. McInerney, you are familiar with the status which Mr. Gerhard Eisler had when he came to the United States in June of 1941? A. I am, sir.

Q. And what status did he come in under?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof, if Your Honor please?

227 The Court: You may make an offer of proof.

Mr. Isserman: I offer to prove that the defendant came to the United States—

Mr. Hitz: May I interrupt a moment? If it is to be an oral offer of proof I suggest it be made at the bench.

The Court: No, just state briefly what the answer is expected to be.

Mr. Isserman: I would like to make an offer of proof if I may.

The Court: The way to make an offer of proof with the witness on the stand is "I offer to prove that the witness' answer would be so and so."

Mr. Isserman: That is what I want to ...

The Court: Well, you may.

Mr. Isserman: I would like to offer to prove that this witness, if permitted to answer, would testify that the defendant Gerhart Eisler arrived in this country in June, 1941, as an alien in transit to Mexico.

The Court: Very well, that is excluded as immaterial and irrelevant.

By Mr. Isserman:

Q. Mr. McInerney, I how ask you whether or not Defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for any change of status from his status as to being here on a transit visa, up to
528 and including February 4, 1947?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would state that the defendant Gerhart Eisler never applied for change in status.

The Court: Well, you mean you expect him to say no. That is the offer of proof.

Mr. Isserman: No.

The Court: Because your question calls for a yes or no answer.

Mr. Isserman: May I have the question read, please?

The Court: No, you may proceed.

Mr. Isserman: Well, Your Honor, I would like to—

The Court: You ought to know how to make an offer of proof.

Mr. Isserman: I am asking the stenographer to tell me what I asked. I want to make sure the defendant's point is covered.

The Court: You may do it this time but don't do it again. You ought to know your own question.

Mr. Isserman: May I object to the Court's remark? I think it is improper and I ask that it be stricken out.

The Court: The Court never strikes its own remarks. You may object to the Court's remarks, but the
229 Court never strikes its own remarks.

Mr. Isserman: I ask to have the Court's remark eliminated from the record.

Would you read the question?

(Pending question read by the reporter.)

The Court: You see, that calls for a yes or no answer.

Mr. Isserman: No, it doesn't, it calls for it in the alternative, and I would like to state an offer to prove.

The Court: State it.

Mr. Isserman: I offer to prove that this witness, if allowed to answer, would answer that the defendant, Gerhart Eisler, did not apply for a change in status from the status of an alien in transit to Mexico from the time of his entry in the United States in June, 1941, up to and including February 6, 1947.

The Court: I still say the question calls for a yes or no answer. I think you are wasting time unnecessarily and I sustain the objection.

Mr. Isserman: I am constrained to enter another objection to Your Honor's statement.

The Court: Very well, you have the privilege of doing so.

By Mr. Isserman:

Q. I ask you, Mr. McInerney, whether it isn't a fact that from and after June 14, 1941, until May 8, 1945, that
230 the defendant was a continuous applicant to governmental authority for permission to leave for Mexico to carry out his intention which he had when he entered the United States?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove, Your Honor, that this witness would answer this question in the affirmative.

The Court: Very well.

By Mr. Isserman:

Q. Now, I ask you, Mr. McInerney, whether or not it is not a fact that from and after the termination of hostilities between the United States and Germany in May, 1945, that the defendant Gerhart Eisler continuously applied for an exit permit authorizing his departure from the United States?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I would like to offer to prove, Your Honor, if this witness were permitted to answer he would answer this question in the affirmative.

The Court: Very well.

By Mr. Isserman:

Q. I now ask you, Mr. McInerney, whether or not it is a fact that the applications of the defendant between June 14, 1941, to May, 1945, to be permitted to leave for Mexico were denied?

231 Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I would like to offer to prove, Your Honor, that this defendant, if he were permitted to answer this question would answer in the affirmative.

The Witness: You mean witness.

Mr. Isserman: I am sorry, I had the defendant on my mind.

By Mr. Isserman:

Q. I now ask you, Mr. McInerney, if it is not a fact that the defendant's application for permission to depart from the United States from and after the cessation of hostilities between the United States and Germany were, in fact,

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I offer to prove, Your Honor, that if this witness were permitted to answer he would answer in the affirmative.

. . . . . .

Mr. Hitz: I have two things to take up with the Court. The first is the question which was asked by Mr.
232 Isserman, which I think was the first question asked of this witness, which I believe the reporter can read to us. I want to move to strike the answer that was given because the question called for an answer that Mr. McInerney bring with him certain papers, or have certain information, and instead of saying he did bring that, or had the information with respect to the arrest of aliens, he said no, and I would like to move that the answer be stricken out.

The Court: What was the answer, can you tell me briefly?

Mr. Hitz: It was with respect as to whether any other aliens were arrested after that date in 1947, and the answer would be zero.

The Court: I will strike it.

Mr. Hitz: The answer will be stricken out as irrelevant?

The Court: Yes.

Mr. Hitz: Also, inasmuch as this was in the presence of the jury, the fact that Mr. Isserman stated he would elicit certain information from the witness if he were permitted to answer does not mean that he would give those answers.

The Court: Oh, no, that means only that is the answer he hopes to get.

Mr. Hitz: Yes, sir.

The Court: The reason I did not want counsel to come to the bench, of course that is our practice, but I did not want counsel to be going back and forth to the bench
233 and the counsel table for each question because I did not think it was such that would elicit prejudicial information.

. . . . . .

Hon. John Parnell Thomas

Further Cross Examination

By Mr. Isserman:

Q. Mr. Thomas, you have been requested to bring to Court with you any communication received by you from the Attorney General of the United States in answer to a letter sent by you to the Attorney General dated January 31, 1947, relating to the surveillance of Gerhart Eisler, and I ask you whether you have such a communication with you? A. I have not.

Q. Did you receive any such communication? A. I did not.

234 Mr. Hitz: I object, and I move that the answer be stricken, Your Honor.

The Court: I think it is innocuous.

Mr. Hitz: I think it is. I just wanted to preserve the continuity of the Government's objections here, whether it was innocuous or not.

By Mr. Isserman:

Q. Did you have any conference or telephonic communication between the Attorney General or any of his representatives between January 31, 1947, and February 4, 1947? A. I did, but—

Mr. Hitz: Just a minute, please, I think that answers the question, because I want to interpose an objection if the substance—

By Mr. Isserman:

Q. In these telephonic conversations—withdraw that. Were those conversations by telephone or by contact? A. There was one telephone conversation from me to one of the officers in the Attorneyy General's office.

Q. And with which official did you have that conversation? A. Mr. Caudle.

Q. And when did you make that telephone call? A. Some time very soon after January 31st; it may have been on January 31st.

235 Q. And that telephone call dealt with the appearance of Gerhart Eisler before your Committee on February 4?

Mr. Hitz: Don't answer that.

By Mr. Isserman:

Q. Or on February 6, 1947, did it not?

Mr. Hitz: Please don't answer. I think now we have identified the telephone conversation sufficiently, and I object.

The Court: Objection sustained.

Mr. Isserman: May I approach the bench, Your Honor?

The Court: I want to make progress.

Mr. Isserman: I do, too, but I have a series of questions, and if the objections would go to all of them it would save time.

The Court: Very well.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Have you a list of the questions written out?

Mr. Isserman: It is more or less mixed up. I will state it orally. The defendant offers to prove that this witness, by telephone conversation and other communications with the Department of Justice procured the arrest of Gerhart Eisler on February 4, 1947, by the Attorney General of the United States on Presidential warrant; and that said

236 arrest was arranged for in order to make certain the appearance of the defendant Gerhart Eisler in custody before the House Committee on Un-American Activities on February 6, 1947.

The Court: I will exclude that. I may say that you have already covered that by that letter from Mr. Thomas.

Mr. Isserman: That doesn't quite answer it.

The Court: Very well, I am going to exclude it. It is irrelevant to any issue in this case.

(Counsel returned to the trial table, and the following occurred:)

. . . . . .

237 Q. Mr. Thomas, before you sent the letter which is marked Defendant's Exhibit No. 1 for identification to the Attorney General, did you have a conference with members of the House Committee on Un-American Activities relating to the surveillance and arrest of Gerhart Eisler?

Mr. Hitz: Please don't answer that. I object.

The Court: Objection sustained. Now, I am going to sustain the objection to this entire line of examination. I think you have protected the record by asking the question, and I am going to rule that the reasons for the apprehension of the defendant, and what led up to his arrest, are all matters that are immaterial.

Mr. Isserman: In connection with the Court's ruling, I would like to approach the bench and make an offer of proof of facts.

The Court: No, you cannot do that because you don't know what this witness will testify to. You can only make an offer of proof if you know what this witness will testify.

Mr. Isserman: If I may state what I except the witness to testify, as you said a while ago.

The Court: Yes.

238 (Counsel for both sides approached the bench, and the following occurred:)

The Court: Make it brief and skeletonize it as much as possible.

. . . . . .

Mr. Isserman: The answers we expect from this line of questions from the witness which we offer to prove, are the following: that this witness, together with other members of the Committee, determined to subpoena Gerhart Eisler

merely because Gerhart Eisler was a German Communist, and for no other purpose within the scope of the Committee's power, that they determined to procure his arrest with the intention of bringing him in custody before the Committee to harass and punish him for his political beliefs, and not to elicit any information upon a matter under inquiry committed to them by Congress.

Mr. Hitz: The Government objects to that.

The Court: I am going to exclude that, however,
239 the Court wishes to make this observation, that the Court does not believe that the witness would have testified as stated in that offer of proof; however, even if he did I would exclude the matter.

Mr. Isserman: In order not to come back again I would like to offer proof further with this witness that the purpose of bringing him before the Committee was to prevent his departure from the United States and his return to Germany. My reference, is, of course, to the defendant Eisler. That is all I offer to prove by this witness.

Mr. Hitz: I object.

The Court: I will exclude that.

. . . . . .

247 Mr. Isserman: . . . .

There is one matter to which our client has called our attention, to which I think I should call the Court's attention. He has complained that much of this trial is being held at bench conferences, which he does not hear
248 and about which he is not informed. He pointed out that this trial is unusual in that respect.

The Court: It is not unusual.

Mr. Isserman: I mean in the number of bench conferences.

The Court: No.

Mr. Isserman: But he would like to be present at the bench conferences which affect his rights.

The Court: No.

Mr. Isserman: May I move to have him present, or move to have the conferences not as bench conferences?

The Court: Yes; I will permit you not to have them as bench conferences. However, bench conferences are intended for the protection of defendants' rights. We have bench conferences so that the jury should not be prejudiced by reason of rulings of the Court. I shall make all rulings hereafter in open court if you prefer, and you may make all motions in open court. It is our practice in this jurisdiction to have counsel make a motion for a directed verdict at the bench, so that the jury may not be prejudiced by the fact that such a motion was made for the defendant.

Mr. Isserman: Is not the jury sometimes excused?

The Court: We do not excuse the jury except for lengthy arguments, because if every time a ruling came up and we had to wait for the jury to go out and then come in, the length of time that would be taken for trial would be interminable.

249 Mr. Isserman: He says he would like to know what goes on, and we cannot tell him when we return, because we are proceeding with the trial.

The Court: If you do not want to protect your client's rights by having conferences at the bench, you may move to bring them up in open court—that is, so far as you are concerned. If Mr. Hitz has anything he wishes to bring up at the bench, they may be taken up at the bench.

Mr. Isserman: I am just following the suggestion of my client.

The Court: I do not care at whose suggestion it is. Bench conferences are intended to be for the protection of the defendant; but if the defendant does not want that protection, he will not have it.

Mr. Hitz: In the same connection, about the defendant's being informed about what has taken place so far, I am asking to have it appear in the record that counsel is getting a daily copy of the record, and I would like to have counsel state what time the following day he receives his

copy. I think it might be well, to complete the record, to have that information.

The Court: Well, the reporter can place that in the record, because the reporter knows when delivery was made.

(The reporter makes the following notation: The record for Wednesday, June 5, 1947, was delivered to Mr. Rein, who called at the reporter's office about 9:45 p.m. and received the record when it was finished. The transcript for Thursday, June 6, 1947, was placed in the mail by the reporter about 10:10 p.m.)

The Court: I want to say this: I will not permit offers of proof to be made except at the bench. I make that qualification to my ruling. There are some offers of proof that I would not permit to be made in open court.

Mr. Isserman: In that case, we would ask that the defendant be allowed to approach the bench.

The Court: No, I deny that. It is not the practice of the Court to allow litigants to come to the bench. Only members of the bar and court officers are allowed to come to the bench.

Mr. Isserman: In this particular case--

The Court: I am not interested in why you make this request. You have a right to make it, and it is denied.

(Counsel returned to the trial table, and the following occurred:)

. . . . . .

Mr. Isserman: At this time we should like to ask the Court, on behalf of the defendant, to take judicial notice of the statements made on the floor of the House of Representatives and reported in the Congressional Record on February 18, 1947, of members of the House Committee on Un-American Activities in connection with the resolution which they had presented to the floor of Congress to cite the defendant in this case for contempt.

The Court: I decline to do so, because that is not a proper matter for the judicial notice of the Court.

Mr. Isserman: May I state an offer of proof in respect to that?

The Court: No; you may not make an offer of proof as to the judicial notice. I decline to take judicial notice. You may identify these matters and hand them to the reporter.

Mr. Isserman: I should like to identify the matters as statements made by Representatives Nixon, Thomas, Rankin, Bonner, Mundt, and Vail, contained in the Congressional Record for February 18, 1947, at pages 1178 to 1187.

Mr. Hitz: The Government objects.

267 Mr. Isserman: I ask that these statements be put into the record.

The Court: The Government objects, and I decline to take judicial notice of them.

Mr. Isserman: At this time—

The Court: Counsel must rise when addressing the Court. You may examine witnesses while sitting down.

Mr. Isserman: The Court is correct. I was in error in sitting down.

(The statements of Representatives Nixon, Thomas, Rankin, Bonner, Mundt, and Vail, just referred to by Mr. Isserman, are identified as appearing at pages 1178-1187 of the Congressional Record for February 18, 1947.)

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268 **Robert E. Stripling**

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Direct Examination

By Mr. Isserman:

Q. Mr. Stripling, how long have you been secretary of the House Committee on Un-American Activities? A. I was the secretary and chief investigator of the Special Committee on Un-American Activities from 1938 until January 3, 1945, at which time I entered the Army. I returned with the standing Committee on Un-American Activities on January 22, 1947.

Q. In the course of your experience as secretary of the committee, you have attended a great many sessions of the committee, have you not? A. I have.

Q. Have you made yourself familiar with the procedure of the committee from January, 1945, to January,
269 1947, when you were not secretary of it? Are you familiar with the procedure then? A. I am not.

Q. Now, in the course of your being secretary for the committee—

Mr. Isserman: I withdraw that.

By Mr. Isserman:

Q. For how many years were you secretary of the House Committee on Un-American Activities?

The Court: He has already answered the question.

Mr. Isserman: I would like to get the number of years, your Honor.

The Witness: Do you mean the House Committee on Un-American Activities or the Special Committee?

By Mr. Isserman:

Q. The first House Committee, which preceded the present standing committee. A. Well, the Special Committee on Un-American Activities—I was with it from 1938 until January 3, 1945.

Q. Now, in the course of your experience with that committee, had you become familiar with the procedure of the committee with respect to witnesses, Mr. Stripling? A. Yes.

Q. Has it been customary on all occasions to allow counsel to be present when a witness is called?

270 Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: I should like to make an offer of proof.

The Court: No; I exclude this as irrelevant; therefore, an offer is not necessary.

Mr. Isserman: I should like to state—

The Court: No. Proceed with the next question. I do not think an offer of proof is necessary unless the admissibility of the testimony depends upon the nature of the answer. But when a subject matter is irrelevant, I do not think counsel needs the protection of an offer of proof.

Mr. Isserman: The offer would indicate relevancy.

By Mr. Isserman:

Q. Now, Mr. Stripling, you have been present before the House Committee on Un-American Activities on occasions when witnesses were attended by counsel? A. I have.

Q. From your experience with the committee and from your observations, you have knowledge of the practice of that committee in respect to the permission given to counsel—in respect to a witness who comes with counsel? A. I have.

The Court: I think that this is irrelevant, Mr. Isserman. What was done in this particular case is, of course, relevant and admissible; but what was done in other cases is not.

271 Mr. Isserman: If the Court please, I am trying to establish a practice of the committee in respect to its procedure.

The Court: My ruling is that the practice is not relevant. The question is what was done in this case, and not what was the general practice.

Mr. Isserman: I would like to make an offer at this time to show through this witness that the practice of the committee when counsel was present with a witness before the committee was to allow the witness to speak; but counsel only to confer with the witness.

The Court: I am going to rule that out as irrelevant on the ground that the only matter that concerns us here is what was done in this case, not what might have been done in other cases.

. . . . . .

273 **Charles M. Rothstein**

Direct Examination

By Mr. Isserman:

Q. May we have your full name, please? A. Charles M. Rothstein.

Q. What is your occupation, Mr. Rothstein? A. I am acting director of the Alien Enemy Control Unit, Department of Justice.

Q. Is that the unit of the Department of Justice which has the supervision and control over enemy aliens arrested under Presidential warrants? A. It is.

Q. Will you state whether or not there is any regulation or authorization in the Department of Justice, particularly in the Alien Enemy Control Unit, permitting the
274 transportation of any person held in custody under Presidential Proclamation 2526, which has been promulgated or issued, except for transportation of such persons for purposes of detention, removal, or release?

Mr. Hitz: I object to the question as irrelevant.

The Court: The objection is sustained on the ground that the subject matter of the question is irrelevant to any issues in this case.

Mr. Isserman: If this witness were permitted—

The Court: No; I will not let you make an offer of proof, because that is not necessary. I rule out this subject matter as irrelevant. I will not let you make an offer of proof in open court.

By Mr. Isserman:

Q. Now, Mr. Rothstein, would you tell us whether or not as a matter of practice prior to the transportation of the defendant Eisler any person in custody under Proclamation 2526 has ever been involuntarily transported except for purposes of detention or removal from the United States.

Mr. Hitz: I object; same ground.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No; and you may not make an offer of proof in open court. Moreover, I do not think an offer of proof is necessary when a subject matter is excluded as irrel-
275 evant. An offer of proof is necessary to protect a litigant's right when the admissibility of the evidence depends on the nature of the answer. But when the entire subject matter is irrelevant, you do not need an offer of proof. But under any circumstances we would hear offers of proof at the bench, and not in open court.

Proceed.

Mr. Isserman: In respect to the last two questions, in view of your Honor's statement, I should like to approach the bench and make an offer of proof in respect to each of them.

The Court: No; in the light of the statement made by defense counsel, I will not allow that. You stated at the last bench conference that you preferred everything done in open court; that your client objected to having things done at the bench that he could not hear. I informed you that the only purpose of a bench conference is to protect the defendant. Now, you may not change back and forth.

Mr. Isserman: I am not trying to change, if your Honor please, but I believe an offer of proof is necessary in this case, and if we cannot make it in open court, we should like to make it at the bench, although I believe—

The Court: Proceed with the next question. In my opinion, an offer of proof is not necessary to protect the defendant's rights when a line of inquiry is excluded as irrelevant. An offer of proof is necessary when the
276 admissibility of testimony depends on the nature of the answer.

By Mr. Isserman:

Q. Mr. Rothstein, will you tell us whether or not persons in custody under Presidential Proclamation 2526 were ac-

corded the rights guaranteed to prisoners of war by the Geneva Convention?

Mr. Hitz: I object.

The Court: Objection sustained; because that is a question of law, as well as because the subject matter of the question is irrelevant.

Mr. Isserman: Could I make an offer of proof in respect to this question? I offer to prove—

The Court: No, I will not let you make an offer of proof. I have told you that I consider this subject matter irrelevant. I might add another reason: What was done in the case of other persons is not relevant here.

Mr. Isserman: My question is directed to the practice of the Alien Enemy Control Unit.

The Court: The practice is not binding on this Court.

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277 **Brunhilda Eisler**

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Direct Examination

By Mr. Isserman:

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Q. You are the wife of the defendant in this case, Mr. Gerhart Eisler? A. Yes, I am.

Q. On or about January 24, 1947, were you present when your husband was subpoenaed to appear before the House Committee on Un-American Activities on February 6, 1947?

A. I was.

278 Q. Subsequent to that day, did you assist your husband in making any preparations for the hearing on February 6, 1947? A. Yes, I did.

Q. Will you tell us what you did? A. I typed the statement and I cut the stencils for the statement that my husband—in which my husband wanted to state his case before the Un-American Activities Committee.

Q. Do you recall on what day that statement was complete? A. I finished my work on this statement on Sun-

day, February 2, two days before my husband was arrested.

Q. You are referring to your husband's arrest on February 4, 1947, are you not? A. That is correct.

Q. Now, did you make any preparations for the hearing in Washington on February 6, 1947, to which your husband was subpoenaed? A. Yes, I did. On February 3, which was a Monday, I went to Pennsylvania Station, and I bought two round-trip tickets to Washington, one for my husband and one for myself, in order to go to Washington on February 5 for the hearing before the Un-American Activities Committee.

Q. I show you some railroad tickets and ask you if they are the tickets you purchased on that day. A. That is right; it says, "February 3, 1947."

279 Q. The tickets are both stamped "February 3, 1947," are they not? A. That is right.

Mr. Isserman: Cross-examine.

Cross-Examination

By Mr. Hitz:

Q. Was that statement you cut the stencils for to be given by him to the committee or to be spread to the newspaper people at the meeting? Do you know? A. It was to be given to the newspaper people; but, as far as I know, my husband wanted to use it to state his case before the Un-American Activities Committee.

Q. So it had those two purposes? A. I think so.

Q. Do you have a copy of it with you? A. I don't.

Q. Do you know how many pages it was? A. It must have been about twenty pages, if I am not wrong.

Q. You would remember it if you saw it, would you? A. Excuse me?

Q. Would you remember it if you saw a copy of it? A. I would.

Q. I show you Government Exhibit 7 for identification. Is this the statement that you typed or that you cut

280 on stencils? A. I think it is.

Q. Will you look at the end of it? Perhaps that will help too. It has a page number on it at the conclusion? A. Yes.

Q. So your answer is that this is the statement? A. That is right. That is the statement I typed and I cut the stencils for.

Q. Did you type any other statement for him to deliver at the time of the meeting, whether to the committee or to anyone else? A. No, I didn't.

Q. Did you see whether or not he prepared any other statement to be given to the committee or anyone else at the time? A. I didn't see a statement that he was to give to anybody at that time, but I know that my husband prepared a small statement, or a few remarks, if you want to, which he wanted to make to protest his illegal arrest by the Un-American Activities Committee—instigated by the Un-American Activities Committee.

Q. When did he prepare those remarks? A. He told me when I saw him the morning of February 6 at the Immigration and Naturalization office in Washington that he tried to—

Q. Just a moment. I asked you when he prepared
281 it. Do you know when he prepared it? A. I just want to answer the question.

By the Court:

Q. No; answer the question directly. The question calls for a statement of time. A. Will you repeat the question?

By Mr. Hitz:

Q. Do you know when he made that statement of remarks that he wanted to give? A. I don't know if he wanted to make a statement of remarks or just if he prepared himself a few notes for a statement he wanted to make.

Q. Were you present when he prepared those notes? A. No, I wasn't.

Q. So all you know about it is what he told you about it; is that so? A. That is right.

Q. Was Mrs. King present when the mimeographed statement, Government Exhibit 7 for identification, was prepared? A. No.

Mr. Hitz: No further questions.

Redirect Examination

By Mr. Isserman:

Q. Just one further question: Did you see your husband from February 4, 1947, to the morning of February 6, 1947?

A. I saw my husband for a short while, while he was
282 detained in Ellis Island.

Q. Did you have any opportunity to confer with him there about any statement? A. I—we spoke together at the hall in Ellis Island. I don't remember; he said something about a statement.

Q. You did not work on any statement then? A. I didn't work on any statement, no.

Q. Did he say something to you about a statement on the morning of February 6, 1947, when you saw him at the office of the District Director of Immigration in Washington, D. C.? A. Yes; he said.

Mr. Hitz: I am sorry; I have to object. I think she has answered the question.

The Court: Yes; objection sustained.

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283 **Gerhart Eisler**

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Direct Examination

By Mr. Isserman:

Q. What is your name, please? A. Gerhart Eisler.

Q. And you are the defendant in this case? A. Yes.

Q. And what is your occupation? A. Writer and journalist.

Q. Mr. Eisler, will you tell us when you came to the United States? A. I came to the United States in June, 1941.

Q. Will you tell us under what circumstances? A. I was a political refugee from concentration camps in France on my way to Mexico.

Q. Do you have any papers from the American Government, United States Government, authorizing you to land in the United States for the purpose of going to Mexico? A. I had a transit visa.

Q. When you say you had a transit visa, that is the authority that was given to you by the United States
284 Consul to land in the United States, was it not? A. Right.

Q. Did you have any other papers? A. Yes, I had a Mexican substitute passport, because I was invited—

The Court: Just a minute, you have answered the question. You need not go over these details because they are irrelevant. You have shown he was here on a transit visa to Mexico. That is enough.

Mr. Isserman: I would like to proceed if I may.

The Court: Ask the next question.

By Mr. Isserman:

Q. I show you a paper and ask you if this is a paper which you had when you landed in the United States in June, 1941? A. Yes.

Q. And I call your attention to the stamp on the paper under date of 8-6-41; that is August 6, 1941, which says "Admitted —"

Mr. Hitz: Just a minute.

The Court: Don't read the contents of the document in front of the jury until it has been admitted in evidence.

Mr. Isserman: I am sorry. May I have this marked as Defendant's Exhibit No. — I think it should be No. 10, Defendant's Exhibit No. 10 for identification.

285 (Document dated August 6, 1941, was marked Defendant's Exhibit No. 10 for identification.)

Mr. Hitz: At this time I would like to say that the Government Exhibit No. 7 for identification referred to, with

the previous witness should be Government's Exhibit No. 6 for identification. May the record show that change, Your Honor?

The Court: Yes, indeed.

Mr. Isserman: This is the Defendant's Exhibit No. 10 for identification and contains a stamp of the American authorities—

The Court: Just a minute, you may not interrogate a witness concerning the contents of an exhibit until the exhibit has been offered and been admitted in evidence.

Mr. Isserman: I am trying, Your Honor, to lay a foundation for its admittance, because it does contain an official stamp.

The Court: If it does the document speaks for itself.

Mr. Isserman: At this time, if the Court please, I offer in evidence Defendant's Exhibit No. 10 for identification.

Mr. Hitz: I object as irrelevant.

The Court: May I see it? (After inspecting document:) I will sustain the objection. The exhibit is irrelevant.

By Mr. Isserman:

Q. Mr. Eisler, did you complete your trip to Mex-
286 ico on the transit visa you had? A. No, I did not.

Q. In June, 1941? A. No.

Q. Did you complete your journey in transit any time subsequent to June, 1941? A. No.

Q. Do you know why you did not complete it?

Mr. Hitz: I object.

The Court: We do not need to go into that. I allowed you to ask a few preliminary questions in order to orient the defendant, so to speak. We always allow that in connection with a defendant taking the stand, but as to the visa I consider it irrelevant. It has no bearing.

Mr. Isserman: I may say we asked the question for a purpose other than argumentation; we would like to make an offer of proof.

The Court: No, that was a question that was raised by your motion to dismiss, was it not, and I heard the motion

to dismiss and I overruled it, so you have a ruling in that matter already. That is in the record.

Mr. Isserman: If the Court please, these are factual matters.

The Court: Yes, but I ruled that the defense was insufficient. My ruling was equivalent to what would have been a demurrer under the old procedure and I ruled that
287 it was insufficient on that issue.

Mr. Isserman: I understand Your Honor's ruling to be that no offer of proof will be allowed on this question?

The Court: Yes.

By Mr. Isserman:

Q. From the time you came to this country, Mr. Eisler, in June, 1941, did you make any effort to leave it? A. Yes, repeatedly from time to time.

Q. What effort did you make?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No; I consider the subject matter irrelevant.

By Mr. Isserman:

Q. Did you at any time subsequent to June, 1941, obtain permission from the United States Government to leave the United States? A. Yes.

Mr. Hitz: I object as irrelevant.

The Court: Objection sustained.

Mr. Hitz: May the witness be cautioned?

The Court: Yes; do not answer the question until counsel has an opportunity to make an objection and the Court has an opportunity to rule on it.

Mr. Hitz: May the answer be stricken if it got
288 in the record?

The Court: Yes.

Mr. Isserman: May I make an offer of proof?

The Court: No.

By Mr. Isserman:

Q. Did you during the period of the last war, Mr. Eisler, while you were in the United States, register as an enemy alien? A. No.

Mr. Hitz: I object.

The Court: Objection sustained. This matter is entirely irrelevant.

Mr. Isserman: May I make an offer of proof?

The Court: No.

By Mr. Isserman:

Q. During the war period, recent war period, did you support the war effort of the United States?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof with respect to the question?

The Court: No.

By Mr. Isserman:

Q. Of what country are you a citizen, Mr. Eisler? A. From Austria.

289 Q. Of what country are you a native, Mr. Eisler?

A. I was born in Germany of Austrian parents; according to German law—

The Court: No, you have answered the question. You are not an expert on law.

Mr. Isserman: May I have the answer?

The Court: His answer was: "I was born in Germany of Austrian parents."

By Mr. Isserman:

Q. In the war period were you ever called by the United States Government to attend any enemy alien hearings on behalf of yourself? A. I couldn't get your question; please may I have the question?

Mr. Isserman: Read the question

(The pending question was read by the reporter.)

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No.

By Mr. Isserman:

Q. Did you at any time in 1946, Mr. Eisler, obtain an exit permit from the Department of State giving you permission to leave the United States?

Mr. Hitz: I object.

290 The Court: Objection sustained.

Mr. Isserman: I would like to make an offer of proof with respect to what this witness would answer if permitted.

The Court: No.

By Mr. Isserman:

Q. Mr. Eisler, at the time you were subpoenaed by the House Committee on Un-American Activities—I will withdraw that.

When was the first time you were subpoenaed by the House Committee on Un-American Activities, Mr. Eisler? A. I think around October 20, 1946.

Q. Where did the subpoena ~~direct you~~ should appear? A. To St. Louis.

Q. Was that a subpoena that directed you to appear before the Committee at St. Louis? A. Yes.

Q. On what date were you to appear there? A. I was supposed to appear on November 23, 1946.

Q. Before November 23, 1946, were you served with a second subpoena, Mr. Eisler? A. Yes, sir, I was served with a subpoena which cancelled the first and directed me to appear in Washington before the Committee on November 22, 1946.

Q. Did you appear in Washington at the hearing of the House Committee on Un-American Activities? A.

291 I did.

Q. On November 22, 1946? A. I did.

Q. What happened when you appeared there?

Mr. Hitz: I object.

The Court: Objection sustained. I don't see any relevancy or any connection with what happened prior to the action on February 6, 1947. We are concerned only with what transpired at the hearing on February 6.

Mr. Isserman: May I make an offer of proof?

The Court: The indictment is directed solely to the default alleged to have taken place on that occasion.

Mr. Isserman: May I make an offer of proof in respect to it?

The Court: No, but you may state your reason if you wish. I will hear you on that.

Mr. Isserman: If the Court please, we believe this testimony is relevant on several grounds. The first ground is that the prior dealings of the defendant with the Committee in respect to his—

The Court: Well, state briefly what your reason is.

Mr. Isserman: I am trying to state it briefly. We believe this information to be elicited from this witness by this question is relevant first, because it goes to the good faith of the defendant in appearing before the Com-
292 mittee on February 6, 1947; secondly, it goes to the motivation of the Committee in subpoenaing him not only on November 22, 1946, but also on February 6, 1947, for motives which were ulterior and not within the scope of any power given to that Committee by the Congress.

The Court: I will adhere to my ruling and exclude this evidence because, in my opinion, neither one of the grounds advanced by counsel justify the admissibility of the evidence.

By Mr. Isserman:

Q. On and after November—withdraw that.

On and after January 24, 1947, Mr. Eisler, did you have any belief as to the activities of J. Parnell Thomas, Chair-

man of the House Committee on Un-American Activities, in preventing your departure for Germany?

Mr. Hitz: I object.

The Court: Objection sustained. Good faith is not in issue here. The only question is whether there was a default, and whether the default was wilful.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, I don't want you to make an offer of proof.

Mr. Isserman: Will Your Honor hear me on it?

The Court: No, because we have discussed this at various points during the trial, and previously on a motoin to dismiss. My ruling is that proof of good faith is not
293 a defense because wilfulness does not depend on good faith or bad faith. Wilfulness depends on whether the default, if there was such, was deliberate and intentional. It is immaterial whether it was done for a justifiable motive or an unjustifiable motive; whether it arises under a misapprehension of one's rights, or not, if it was wilful.

Mr. Isserman: I believe I should also point out that it goes to due process—

The Court: I overrule that also because I hold that the Court has no authority to scrutinize the motive of Congress or one of its committees. I have to assume, and I shall assume, that the Committee was making an investigation for proper purposes within the power of Congress; moreover I might say, since the default charged against the defendant is not a failure to answer questions but a failure to take the oath, it is immaterial what the subject matter of the inquiry was going to be.

You may proceed.

By Mr. Isserman:

Q. Now, on January 24, 1947, were you served with a subpoena to appear before the House Committee on Un-American Activities on February 6, 1947? A. I was.

Q. Do you know the name of the person who served the subpoena on you? A. Mr. Russell; I don't know the first name.

294 Was it Mr. Russell? A. Yes.

Q. And before Mr. Russell served that subpoena was he in touch with you by telephone? A. Yes, he called me and asked me when I would be home in order to serve the subpoena.

Q. Did you make any arrangement with him so that he could serve you with the subpoena? A. Yes, I did.

Q. And what was that arrangement? A. The arrangement was that I would stay home until he could give me the subpoena, which I did.

Q. Now, when you were served with a subpoena on January 24, 1947, did you have any intention as to your appearance before before that committee? A. Yes, sir.

Mr. Hitz: I object.

The Court: Objection sustained; the defendant's intention is immaterial.

Mr. Hitz: May the answer be stricken if it was gotten by the reporter?

The Court: Yes.

Mr. Isserman: I didn't get it?

The Court: The answer may be stricken.

By Mr. Isserman:

295 Q. Did you make any preparation for appearing before the House Committee on Un-American Activities on February 2nd of 1947?

Mr. Hitz: I object.

The Court: I think I will overrule the objection. The defendant's wife testified concerning preparations and her testimony was permitted, so I think I will allow it.

The Witness: I may answer?

The Court: Yes.

The Witness: Yes, I made preparations.

By Mr. Isserman:

Q. Now, you may tell us what preparations you made? A. Well, I prepared a statement which I was ready to give to the Committee and then later to the press.

I conferred with counsel about my rights at such a hearing.

I made technical preparation in regard to railroad tickets, in regard to reservation of hotel rooms in Washington. Those were the preparations.

Q. You say you consulted counsel about your rights at the hearing. What counsel did you consult? A. My counsel, Mrs. Carol King.

Q. Did counsel advise you as to these rights? A. Yes, counsel advised me—

Mr. Hitz: I am sorry, you have answered the question.

The Court: Just answer yes or no.

296 The Witness: Yes.

By Mr. Isserman:

Q. What did you ask your counsel?

Mr. Hitz: I object.

The Court: Objection sustained. I might say the reason I am excluding this line of inquiry is that under the cases the advice of counsel is not a defense. It has been so held by the Court of Appeals of this District in the Townsend case, and the Supreme Court of the United States in the Sinclair case.

Mr. Isserman: Of course, Your Honor is aware of conflicting opinions in this jurisdiction.

The Court: I rule consistently in accordance with what I understand to be the holding of the Supreme Court of the United States and the Court of Appeals that this matter is not relevant.

Mr. Isserman: This is not the time to argue, but I wonder if Your Honor would hear me on that?

The Court: No, because I have been over that, and I might say this, Mr. Isserman, that my practice is not to

hear extended arguments on questions of admissibilty of evidence. A Trial Judge is not in position to do that and at the same time dispatch business.

Mr. Isserman: May I make an offer of proof in respect to it?

297 The Court: No.

By Mr. Isserman:

Q. Mr. Eisler, did you proceed to Washington on—I withdraw that,

On what day did you plan to proceed to Washington to attend a hearing before the House Committee on Un-American Activities? A. February 5, 1947.

Q. Did you proceed on February 5 as you had planned? A. I did not.

Q. Why not?

Mr. Hitz: I object.

The Court: I think, Mr. Isserman, we have had the facts from four or five witnesses that he was arrested.

Mr. Isserman: I believe the witness should be allowed to testify.

The Court: I beg pardon?

Mr. Isserman: I believe the witness should be allowed to testify.

The Court: I dislike unnecessary examination on matters that are undisputed, but I will let the witness answer the question.

Mr. Isserman: It is preliminary.

The Court: You may answer.

The Witness: I was arrested on February 4, and, 298 therefore, I could not proceed to Washington.

By Mr. Isserman:

Q. And where were you taken on February 4, 1947?

Mr. Hitz: I object on the same ground.

The Court: I will let him answer.

The Witness: I was transported to the office of the District Attorney of Brooklyn, New York; at least I think that was the office.

By Mr. Isserman:

Q. Were you advised there of the purpose of your arrest? A. No, I was not, I was—

Mr. Hitz: I am sorry, you have answered the question.

The Court: The question calls for a yes or no answer.

The Witness: Pardon me, may I have the question, please?

Mr. Isserman: I think you have answered the question.

By Mr. Isserman:

Q. Did anyone show you a warrant at the time ordering your arrest? A. No.

Mr. Hitz: I object.

The Court: Objection sustained. I will not go into matters of the arrest.

Mr. Isserman: If Your Honor please, may I be permitted to make an offer with respect to that?

299 The Court: No, I consider the subject matter to be irrelevant.

Mr. Isserman: I take it Your Honor will not entertain an offer of proof?

The Court: That is correct.

By Mr. Isserman:

Q. After you had been taken to the office of the District Attorney in Brooklyn were you taken any other place? A. Yes, to Ellis Island.

Q. How long were you in Ellis Island?

Mr. Hitz: I object.

The Court: I will let him answer.

The Witness: I arrived at Ellis Island on the 4th about 2 o'clock in the afternoon until the 5th about 3 o'clock in the afternoon.

By Mr. Isserman:

Q. And what happened on February 5 at 3 o'clock in the afternoon? A. I was told I would be brought in custody of two guards to Washington.

Q. Who told you that? A. An officer at Ellis Island and the two guards involved.

Q. Are the two guards you refer to the officers of the Department of Immigration and Naturalization who
300 testified previously at this hearing? A. Yes, those were the two gentlemen.

Q. Did the guards tell you where you would be taken? A. They told me they knew nothing only that they were to take me to Washington.

Q. Did they ask you if you wanted to go to Washington?

Mr. Hitz: I object.

The Court: He may answer.

The Witness: No, they did not.

By Mr. Isserman:

Q. Now, when did you arrive in Washington? A. I arrived at the station about 9 o'clock in the evening, and I was brought to the District Jail, I think it is called the Washington District Jail.

Q. And did you you stay in the District Jail overnight? A. Yes, I stayed there.

Q. And from the time of your arrest to the time you were confined in the District Jail had you consulted with your counsel, Carol King? A. No.

Mr. Hitz: I object; I am sorry, I object.

The Court: I will let him answer, but just answer the question.

The Witness: No, I did not.

By Mr. Isserman:

301 Q. Now, what happened on the morning of February 6, 1947? A. I was brought in the morning, I guess it was about 8 o'clock, or a little later, I don't know

exactly the time, from the District Jail to the office of Immigration and Naturalization.

Q. And about what time in the morning was that?

The Court: He has already answered that. He said about 8 o'clock.

Mr. Isserman: I am talking now about the time he reached the office of the Director of Immigration. I do not believe the witness did answer that.

The Court: Well, you may answer it again.

The Witness: I did not have a watch but I think it was between 8 and 8:30 in the morning.

By Mr. Isserman:

Q. And while at the office of the District Director of Immigration and Naturalization did you there confer with your counsel Carol King? A. Yes.

Q. Was that conference in private or in the presence of other persons? A. It was not in private; the two very correct security officers were always around.

Q. Did your counsel give you any advice with re-
302 spect to your appearance before the hearing later that day?

Mr. Hitz: Answer yes or no, please.

The Witness: Yes.

By Mr. Isserman:

Q. And by the hearing I mean the hearing before the House Committee on Un-American Activities. A. Yes.

Q. What did you ask your counsel?

Mr. Hitz: I object.

The Court: Objection sustained.

By Mr. Isserman:

Q. Did you ask your counsel anything about—

The Court: No, you need not pursue this question.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, it is not necessary. I am going to rule

out the subject matter of any conference between the defendant and his counsel.

Mr. Isserman: That would be true of questions asked this witness by Mrs. King if I called her, is that correct?

The Court: I only rule on one thing at a time. I am now only ruling in so far as this witness is concerned.

By Mr. Isserman:

Q. Now, did you have any writing materials with you when you were in the Washington Jail on the night of February 5 and the morning of February 6, Mr. Eisler?

A. Yes, sir.

Q. What did you have? A. A few pieces of yellow sheets.

Q. Did you ask for an opportunity to do some writing while you were confined in the jail? A. I asked it very urgently.

Q. And were you given such an opportunity? A. No, I don't think I was.

Q. Did you have any light by which you could write?

The Court: I think all this is irrelevant.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, I won't let you do that because I consider it irrelevant. I am permitting you to show the chronology of events but I am not going to permit you to go into details that are not germane to any issue.

Mr. Isserman: In this case it is not a matter of chronology but a matter of preparation of some remarks which have been testified to here and will be testified to.

The Court: No, I will exclude it.

By Mr. Isserman:

Q. Did counsel remain with you from the time you conferred with counsel in the office of the Director of Immigration and Naturalization until you were brought to the hearing room of the House Committee on Un-American Activities? A. No.

304 Q. When did you next see counsel after you saw counsel in the District Director's office? A. I saw her, if I recollect, a few minutes before the hearing started or in the committee room.

Q. Did you at the time you entered the committee hearing room, Mr. Eisler, know whether or not counsel would be allowed to be with you when you were under examination by the Committee?

Mr. Hitz: I object.

The Court: I am going to allow it. You may answer.

The Witness: No, I did not know whether my counsel would be allowed.

By Mr. Isserman:

Q. Had you any reason on the morning of your appearance at the hearing room of the House Committee on Un-American Activities to believe that you would not have counsel with you?

The Court: Well, now, that I am going to exclude.

Mr. Isserman: I would like to make an offer of proof.

The Court: No, that is argumentative. He did not know whether counsel would or would not be allowed. I permitted that answer but I am going to exclude the other one.

Mr. Isserman: I want to show the basis of the uncertainty on the witness' part, if Your Honor please.

The Court: Well, I have excluded it.

By Mr. Isserman:

305 Q. Will you describe the conditions in the hearing room when the hearing commenced on the morning of February 6, 1947, when you were brought into the hearing room— A. (Interposing) Yes, sir.

Q. (Continuing) —by the security officers of the Immigration and Naturalization Department? A. Well, if I recollect, it was quite noisy, reporters were rushing in and out, and photographers were flashing bulbs, and there was some considerable excitement in this committee room.

Q. Now, so far as you were concerned, Mr. Eisler, what was the first thing that happened after you were at the hearing room on the morning of February 6, 1947? A. I think the first thing that happened was that somebody—I think it was Mr. Thomas or Mr. Stripling, I can't recollect—asked me to take the stand.

Q. Mr. Thomas has testified at this hearing to the effect that—

Mr. Hitz: I object, that is improper direct examination of any witness.

Mr. Isserman: A question by way of rebuttal—

The Court: I beg pardon?

Mr. Isserman: A question by way of rebuttal of the Government's testimony.

The Court: I will let you ask the question and I will rule on it afterward.

306

By Mr. Isserman:

Q. Mr. Thomas has testified at this hearing that you were asked to take the stand.

The Court: When you say "at this hearing" do you mean this trial?

Mr. Isserman: That is correct; I mean at this trial. I will withdraw the question.

By Mr. Isserman:

Q. Mr. Thomas has testified at this trial, Mr. Eisler, that after you were asked to take the stand you said, "I am not going to take the stand," and I ask you now whether you made that statement? A. Yes, it was the first part of the statement which I was not able to answer because I was interrupted.

Q. What was the second part? A. I wanted to say—

The Court: No, you have answered the question.

By Mr. Isserman:

Q. Now, will you tell us how you wanted to complete the statement if you had not been interrupted, Mr. Eisler? A. "Before I make a few remarks."

Q. In other words, you said you were not going to take the stand until after you made a few remarks? A. Right.

307 Q. As a matter of fact, did you take the stand after you made the statement you would not take the stand? A. A few minutes later I went to the stand.

Q. Now, it has been testified to here, Mr. Eisler, that you said at the hearing on the morning of February 6, the following statement:

"Before I take the oath"—

Mr. Stripling said: "Mr. Chairman."

And you said, "I have the floor now."

Now, would you tell us what you meant by that statement? A. The statement—

Q. That "I have the floor now"? A. I was merely angry because Mr. Stripling, who is not the chairman of the committee, interrupted me, not the Chairman of the Committee, and so I wanted to tell him; I was appealing, so to speak, to the Chairman of the Committee to get a chance to complete my sentence.

Q. So the statement was that before you took the oath— A. (Interposing) I wanted to make a few remarks.

The Court: Just a minute.

The Witness: Pardon.

By Mr. Isserman:

Q. The statement you made before you were to take the oath was not a complete statement? A. No.

308 Q. And Mr. Stripling prevented you from making a complete statement? A. Yes.

Q. And what did you want to say? A. Before I took the oath I wanted to make a few remarks in connection with my arrest.

Q. Now, I would like to call your attention to the fact that Mrs. Eisler testified that you had before the night of February 2, 1947, completed—

The Court: Now just a minute, Mr. Isserman, I do not think that is a proper form of direct examination. You

cannot frame your questions on direct examination so as to refresh the witness' recollection by referring to some other witness' testimony.

Mr. Isserman: My purpose was to save time but I will do it the other way.

The Court: Well, ask the question.

By Mr. Isserman:

Q. Mr. Eisler, you prepared a statement which you expected to read before the committee on February 6, 1947, did you not? A. I did.

Q. And when was that statement completed? A. On February 2, 1947, Sunday evening.

Q. And that was a lengthy statement, was it not?
309 A. It was 20 pages, at least 20 pages.

Q. Now, was it your intention to read that statement when you said, "Before I take the oath I want to make a few remarks"? A. No, the reading of that statement would have taken one hour at least.

Q. Mr. Eisler, on February 6, 1947, when you were present before the House Committee on Un-American Activities did you at any time refuse to be sworn? A. No; I made repeated efforts to be sworn in.

By the Court:

Q. When you say you made repeated efforts to be sworn you mean you made offers to be sworn on condition— A. (Interposing) Yes.

Q. (Continuing) —that first you be given an opportunity to speak? A. Correct.

Q. You did not make any unconditional offer to be sworn, did you? A. It was conditioned if I would be allowed three minutes to speak I would unconditionally take the oath.

By Mr. Isserman:

Q. And did you tell the members of that Committee and the Chairman how long a period you desired in which

310 to make a few remarks? A. Many times exactly three minutes.

Q. At the hearing on February 6, 1947, did you refuse to answer any questions? A. I made—

The Court: Well, I do not think you need to go over that because there is no contention that any questions were asked.

Mr. Isserman: There has been evidence and I would like to get the witness' own story.

The Court: No, the Government does not contend that he refused to answer questions so it is unnecessary to refer to something not contended for.

Mr. Isserman: But I believe the witness should be allowed to state what he did say on the morning of the hearing. May I be permitted to ask the question?

The Court: The Government does not contend that any questions were asked of him, or that he declined to answer any questions, therefore it is irrelevant because the default charged against him is the refusal to take the oath, and that is the only default.

Mr. Isserman: I would like to call your attention to the fact that Mr. Thomas was allowed to testify to all the questions and that he did testify that some of the testimony involved the question that Mr. Eisler refused to be sworn and I would like to interrogate him as to what statements

311 were made at the hearing.

The Court: You may do that, yes. I was only ruling out the particular question as asked. You may reframe the question.

By Mr. Isserman:

Q. Will you tell us what you said to the Committee after they asked you to be sworn, after Mr. Thomas asked you to be sworn on the morning of February 6, 1947? A. I told them many times, "Give me a chance to speak three minutes and then I will take the oath and make my statement."

Q. You say you said that to the more than once? A. I

don't know how many times but I repeated it quite a few times.

Mr. Hitz: May I have the answer read?

(The last answer was read by the reporter.)

Mr. Hitz: The answer to the question before that.

(The previous answer was read by the reporter.)

By Mr. Isserman:

Q. Did you make any statement before the Committee in respect to the reading of the statement which you had prepared and completed on February 2, 1947? A. No.

Q. Mr. Eisler, why did you ask the Committee for three minutes to make some remarks before you would be
312 sworn on the morning of February 6, 1947? A. Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person.

Q. Had you consulted with counsel with respect to your right to object to being sworn— A. (Interposing) Yes.

Q. (Continuing) —on the morning of February 6, 1947?

The Court: Just a minute, Mr. Isserman, I am going to exclude that for the reason heretofore stated.

By Mr. Isserman:

Q. Have you any recollection, Mr. Eisler, what you intended to say in the three minutes of remarks had the Committee allowed you to make them?

Mr. Hitz: I object.

The Witness: Yes.

The Court: I will let him answer the preliminary question.

The Witness: Yes.

By Mr. Isserman:

Q. Now, will you tell us what you intended to say to the House Committee on Un-American Activities in the three minutes you asked for before being sworn?

Mr. Hitz: I object.

The Court: Objection sustained.

313 Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary; I consider that irrelevant.

Mr. Isserman: I believe if Your Honor would hear my offer of proof it would not be irrelevant. I believe Your Honor would do consider it.

The Court: Ordinarily I do not permit offers of proof before the jury because that is an indirect way of getting testimony in before the jury after the Court has excluded it. Moreover, I consider the subject matter irrelevant.

Mr. Isserman: I am perfectly willing to make the offer of proof at the bench if Your Honor will allow us to make it there.

The Court: You may come to the bench.

(Counsel for both sides approached the bench, and the following occurred:)

The Court: Make it very brief. Do not take the full three minutes; make it very brief.

Mr. Isserman: The defendant, if allowed to answer this question, would state that he would have made the following remarks; "I am a political prisoner"—

The Court: No, I am not going to allow you to read the whole statement. What is the general import?

Mr. Isserman: To the Committee causing his illegal arrest because the illegal arrest was procured by Mr.

314 Thomas and members of the House Committee on Un-American Activities; that the purpose of the arrest was for no purpose within the scope and power of the House Committee on Un-American Activities.

The Court: I think you have given me enough to give—

Mr. Isserman: If you will hear me.

The Court: Make it very brief.

Mr. Isserman: I am trying to make it very brief; that he had no opportunity for full consultation with his coun-

sel; that he was going to ask for an adjournment until the matter of his arrest had been cleared up, and that the purpose of subpoenaing him had no relevancy to any matter within the powers of the Committee; that the Committee had called him because of his political views, and to prevent his departure to Germany.

The Court: I shall adhere to my ruling.

(Counsel returned to the trial table, and the following occurred:)

By Mr. Isserman:

Q. Now, Mr. Eisler, after you had—withdraw that.

Mr. Eisler, had you been allowed to make your statement of three minutes would you have then answered all questions put to you by the Committee?

Mr. Hitz: I object.

The Court: Objection sustained; that is speculative and conjectural.

By Mr. Isserman:

Q. Mr. Eisler, at the time you were in the hearing room did you make any statement to the Committee which indicated that if you were allowed the three minutes to make your objections that you would have answered the questions and been sworn?

Mr. Hitz: I object.

The Witness: I did.

The Court: I will let the answer stand, but don't answer until counsel has had an opportunity to get his objection in and the Court has an opportunity to make its ruling.

By Mr. Isserman:

Q. Mr. Eisler, I ask you whether or not at the hearing on February 7—February 6 before the House Committee on Un-American Activities you made the following statement:

"I have never refused to be sworn in. I came here as a political prisoner. I want to make a few remarks, only three minutes before I will be sworn in to answer your questions and make my statement. It is three minutes."

Did you so state at the hearing? A. Yes.

* * * * * * * * *

316 Mr. Isserman: May I suggest I may have one or two additional questions of Mr. Eisler?

The Court: Oh, yes.

Mr. Isserman: Not to be precluded.

The Court: Oh, no.

Ladies and gentlemen of the jury, we are going 317 to suspend at this time until tomorrow.

* * * * * * * * *

322 The Court: You may proceed.

Mr. Isserman: If the Court please, I had reserved the right to ask the defendant a few more questions. I should like to do so at this time.

The Court: You do not reserve the right; the Court will grant that privilege in its discretion.

Mr. Isserman: I mentioned it at the close of the session yesterday.

The Court: You may proceed.

* * * * * * * * *

Direct Examination (resumed).

By Mr. Isserman:

Q. Mr. Eisler, you testified that when you were in the Washington Jail on the morning of February 6 you 323 had some yellow paper in your possession? A. Right.

Q. By that paper, you were referring to paper similar to the kind I am indicating? A. That is right.

Mr. Isserman: Indicating legal manila paper.

By Mr. Isserman:

Q. Now, at the time you were before the Committee, did you have any papers in your hand—that is, on the morning

of Nebraska? A. Yes; I had a few sheets of paper and a few newspaper clippings.

Q. Were those sheets which you had the yellow papers that you have just testified about? A. That kind of yellow sheets.

Q. Was there any writing on those yellow sheets? A. There were notes on them.

Q. Had you made those notes? A. Yes, I had made notes in the District Jail.

Q. Will you tell us the contents—

Mr. Isserman: I withdraw that.

By Mr. Isserman:

Q. Was it your intention to use those notes in making your objection before you were sworn?

Mr. Hitz: Please do not answer. I object.

324 The Court: This question assumes a fact concerning which there has been no testimony. The word "objection" has never been used before by this witness.

Mr. Isserman: I would like to call the Court's attention to a statement by this witness in the record.

The Court: Where is it? The witness testified he wished to make a statement concerning the circumstances of his arrest.

Mr. Isserman: I call the Court's attention to a statement by the witness on page 312, which is in answer to a question which commences on page 311 of the record.

The Court: Will you read the question, please?

The Reporter: (Reading) "Question: Was it your intention to use those notes in making your objection before you were sworn?"

The Court: What is the objection, Mr. Hitz?

Mr. Hitz: I think the objection has been answered. I did not recall the foundation laid for the question.

The Court: Yes; I think there is a foundation.

Mr. Hitz: Yes; I think it is proper, and I shall not object. I withdraw my objection.

The Witness: This was the basis of my—

By the Court:

Q. Just answer yes or no. A. Will you repeat the question?

325 The Reporter: (Reading) "Question: Was it your intention to use those notes in making your objection before you were sworn?"

The Witness: Yes.

By Mr. Isserman:

Q. Do you recall what was on those yellow sheets of paper, Mr. Eisler? A. I recollect—

The Court: I am going to exclude that.

Mr. Hitz: I object to it.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary to make an offer of proof, because I consider the matter irrelevant. I think an offer of proof is necessary to protect a party's rights if the admissibility of the evidence depends in whole or in part on the nature of the answer. But where the subject matter itself is irrelevant; it is not necessary to make an offer of proof to protect a party's rights.

By Mr. Isserman:

Q. Now, Mr. Eisler, you intended to use those notes in stating your objection before you were sworn, did you not?

Mr. Hitz: I object on two grounds: The question is leading and is irrelevant.

The Court: I am going to sustain the objection on the ground that the question has already been answered.

326 By Mr. Isserman:

Q. Mr. Eisler, will you tell us the language in which you intended to state your objection to the Committee on the morning of February 6, before you would be sworn?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary. I have told you before when I think an offer of proof is proper. One ruling protects just as much as a repetition of it.

Mr. Isserman: I just wanted to make certain that the witness' rights in respect to this question are protected.

The Court: I am stating that one ruling protects you just as much as though the same ruling were repeated a dozen times.

By Mr. Isserman:

Q. I call your attention, Mr. Eisler, to a question on page 307 of the record, which was put to you yesterday by me. The question reads as follows:

"As a matter of fact, did you take the stand after you made the statement you would not take the stand?"

I call your attention to your answer, which reads:

"A few minutes later I went to the stand."

Does that answer correctly give the answer you intended to make at yesterday's hearing? A. Definitely it is
3327 not my answer.

Q. Will you tell us what answer you intended to make at yesterday's hearing? A. I intended to say I went to the stand a few seconds later.

Q. Did you have with you on the morning of February 6, 1947, at the hearing before the Committee on Un-American Activities, a copy of the long mimeographed statement which you had completed by February 2, 1947? A. I had it in my pocket.

Q. Did you intend to make any use of that statement at the hearing before the Committee? A. Of course.

Q. What use did you intend to make of that statement? A. I wanted during the—in the course of the hearing to read the statement after I had taken the oath, and would have given it later to the press.

Q. Did you intend to read that statement when you asked for time to make objection to the Committee's proceedings? A. I wanted three minutes—

The Court: We were over that yesterday.

Mr. Isserman: May he be allowed to finish? That is my last question.

The Court: Very well.

The Witness: I asked for three minutes for objections. This reading of the statement would have taken one hour.

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Mr. Isserman: That is all.

Cross Examination:

By Mr. Hitz:

Q. Did you tell the Committee you had a statement that would take one hour to read, Mr. Eisler? A. No, I didn't.

Q. As a matter of fact, the statement itself you intended to read before you were asked any questions, did you not? A. No, by no means.

Q. Isn't it a fact that you had in the statement something to the effect that you were not going to answer certain questions?

Mr. Isserman: If the Court please, the statement has been marked for identification by the United States Attorney. We have no objection to the entire statement going into evidence if it is going to be referred to as to its contents, although we believe it is irrelevant under Your Honor's previous ruling.

The Court: This is proper cross examination.

By Mr. Hitz:

Q. Isn't it a fact that in that statement you intended to read, as you say, after you were sworn and, as you say, after you had been asked certain questions, you said, "I will not answer certain questions," and you stated what those conditions would be?

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Mr. Isserman: I have to make an objection—

Mr. Hitz: Let me finish my question.

By Mr. Hitz:

Q. Isn't it a fact that you mentioned in detail the questions that you would refuse to answer were you asked them? A. Yes, I think so.

Mr. Isserman: I would like to object to that question on the ground—

The Court: The question has been answered by the witness; and this is cross examination.

Mr. Isserman: May I save my objection to this line of questioning?

The Court: What is your objection?

Mr. Isserman: My objection is that, under the rulings of this Court, the witness is not charged with refusing to answer any questions. The questions directed by counsel for the defendant to the defendant yesterday were overruled because of that.

The Court: The test of what is proper cross examination is twofold: Cross examination may relate either to matters brought out on the direct examination, or it may relate to credibility. I think that this question is proper on either ground or on both grounds.

330 By Mr. Hitz:

Q. I think you have answered the question; have you, Mr. Eisler? A. Not fully yet.

Q. Please answer it as fully as you care to. A. This statement—

Q. I think the question is, Didn't you state in your written statement that there were a number of questions that you would refuse to answer should you be asked them? That was the question. Have you answered the question? A. If you would give me for recollection the text of my statement, I could answer more perfectly.

Q. You wrote it, didn't you? A. Quite a time since then; many things happened.

Q. I will get on to the next question, and your counsel, if necessary, can show you that.

Mr. Isserman: If the Court please, the witness has been asked a question.

The Court: Counsel may not interrupt the examination of a witness except for the purpose of noting an objection; and I will rule on the objection.

Mr. Isserman: I should like to make a motion.

The Court: What is the motion?

Mr. Isserman: My motion is that this witness be allowed to refresh his recollection from the statement which
331 the Government Attorney has in his hands.

The Court: That is an improper motion. If the question was persisted in, and the witness said he could not remember, and he stated a desire to refresh his recollection, he would be permitted to do so. But the question has been abandoned.

Mr. Isserman: I will withdraw the motion if the question has been withdrawn.

By Mr. Hitz:

Q. Does not that refresh your recollection, Mr. Eisler, as to whether or not you intended making this statement before being asked any questions instead of after being asked any questions? A. About this, I don't need any refreshment of my recollection. This statement I wanted to make after I took the oath, in the course of the hearing. It was a one-hour statement, not a three-minute statement.

Q. Did you intend making it before or after you were asked questions by the Chairman and the members of the Committee? A. Well, I didn't know how the Committee would decide. I would have asked in the course of the hearing to give me a chance to make this statement whenever the members of the Committee thought it opportune; but I wanted to have it during the hearing.

332 Q. You told them in the statement, did you not, or intended to tell them, that you would not answer any questions about any friends or relatives or acquaintances, and you would not even tell them who your laundry

man was? A. I didn't think my laundry man was relevant to the question on investigation.

Q. But you also said you would not mention any friends' or acquaintances' names; isn't that so? A. So far as I can recollect, I said I would answer—and I have answered—all pertinent questions; I would not answer questions which are not pertinent to the case on investigation; and the case on investigation, in which the statement was directed, was the testimony of a certain Budenz on November 22. Against this man my statement was correct.

Q. You also said you would not answer anything concerning your biography? A. I don't think the question of my—

By the Court:

Q. Just a moment. Answer the question yes or no. A. So far, my biography was not relevant to the question of investigation.

By Mr. Hitz:

Q. So you were imposing conditions to your questioning even before you had taken the stand; is that not true? A. No, by no means. That was a proposal. If the Committee would have convinced me certain questions were relevant, I would have answered these questions.

By the Court:

Q. You mean you would have made yourself the judge? A. By no means, Mr. Judge. If the Committee would have told me, "Certain parts of your biography are relevant," and would have convinced me they are relevant, I would have given them also parts of my biography.

By Mr. Hitz:

Q. You would not have given them the names of any of your friends, would you, Mr. Eisler? A. I would have

given them only such friends which I was sure they could not slander and defame.

Q. You would judge that, would you not? A. I guess I would.

Q. So you had a condition, did you not, upon the questions that you would answer? A. By no means. It didn't come into the investigation, not even into the proceeding, what I would have done if the statement would have come into the hearing. That was a question of fact of the whole Committee.

Q. You never intended to answer fully the questions of the Committee? A. I know there are certain questions the Committee is not allowed to ask me, for instance,
334 and I would have a legal right to refuse. I think they had no legal right to ask me questions which were not pertinent to the case in investigation.

Q. You would be the judge? A. No, I would not be the judge. I would have asked my counsel. I would have stated my objections to the Chairman and the other members of the Committee, and I would have tried to convince them of the rightfulness of my objections and my position; and I think if it would have come to such a discussion, maybe a few members of the Committee would have seen my point of view.

Q. You say you would not have been the judge? You can answer that yes or no. A. I am not a judge.

Q. You would not have been judge or whether it was pertinent or not? A. Not the only judge.

Q. You would have asked your counsel? A. Sure, I would.

Q. Wasn't she there with you? A. Well, she was there.

Q. You intended to ask her in the Committee room whether you had to answer the questions? A. I would have asked her any questions where there would have been a legal doubt in my mind.

335 Q. Before you answered the question? A. Before I answered the question; that is correct.

Q. In the Committee room? A. If I would have got the opportunity in the Committee room; if not, outside.

Q. You testified yesterday you did not know whether you would be allowed to consult with her or not, didn't you? A. Absolutely.

Q. As a matter of fact, Mr. Eisler, you in your own words, that you had expressed in writing, actually delivered to the press, were in contempt; that is, you felt a contemptuous feeling for the Committee; isn't that true? A. I felt a very much contemptuous feeling, absolutely.

Q. You did? A. Yes.

Q. Mr. Eisler, you never did answer any questions, of course, except those relating to your taking the stand or not taking the stand; correct? A. I didn't have any opportunity.

Q. You never took the oath to testify, did you, Mr. Eisler? A. I was prevented to take the oath by illegal proceedings of the Committee.

Q. You did not take the oath, did you?

By the Court:

336 Q. Answer yes or no. A. I couldn't take the oath.

Q. Answer yes or no. Did you take the oath? A. No, I didn't take the oath.

Mr. Hitz: No further questions.

Redirect Examination

By Mr. Isserman:

Q. When you said a moment ago that you had a contemptuous feeling toward the Committee, was that related to the question of whether you would be sworn or make answers, or not? A. No, sir. That is my private feeling, which is every man's right.

Q. Upon what is that contemptuous feeling based, which you say is your private feeling? A. On the whole biased practice of this Committee, which I know from the past, and especially the past practice against me.

The Court: Just a moment. I am going to exclude that question. I think it is irrelevant.

By Mr. Isserman:

Q. You testified that in determining whether any question was pertinent or not, you would ask your counsel; is that correct? A. Right.

Q. Were you advised by counsel that you had under
337 the law a right not to answer questions that were not pertinent?

The Court: I am going to exclude, as I did yesterday, any advice of counsel. I am doing so on the authority of the Sinclair case as well as on the authority of the Townsend case.

Mr. Isserman: This is the advice of counsel in respect to a matter opened up by the State.

The Court: I am going to exclude that.

By Mr. Isserman:

Q. Mr. Eisler, did you know—had you been advised—as to the law in respect to your obligation to answer questions before the Committee on Un-American Activities?

The Court: I am going to exclude that on the same ground.

By Mr. Isserman:

Q. Do you know what the law was in respect— A. Yes, I knew.

The Court: Just a moment.

By Mr. Isserman:

Q. Let me finish my question.

Mr. Eisler, do you know what the law was in respect to your rights before the Committee on Un-American Activities in answering questions from the standpoint of whether those questions were pertinent to the investigation or not?

The Court: I am going to exclude this question for
338 the same reasons. The Townsend case and the Sinclair case hold that even if the witness had a misconception of his legal rights, even if it was in good faith, that would constitute no defense.

Mr. Isserman: At this point it is not a question of misconception of his rights; I asked him if he knew the law in respect to pertinent questions. Your Honor knows there is a section of the law which governs that.

The Court: Yes, but it is immaterial whether he knows it or not, or whether he knows it correctly or incorrectly, because those questions of law are for the Court to determine. What this witness' view of the law was is immaterial.

Mr. Isserman: Well, then, I ask the Court to charge accordingly.

By Mr. Isserman:

Q. Now, in the statement—the mimeographed statement—which you had with you, was there anything in that statement which indicated that it would be read by you before the Committee on Un-American Activities after you were sworn? A. I think so.

Q. Can you tell us what was in the statement which indicated that you would give it after you were sworn, Mr. Eisler? A. I couldn't recollect exactly the words. If you would let me refresh my memory, I could give it in
339 exact words.

Q. I show you page 18 of the mimeographed statement and ask you if that is one of the pages of the statement to which you have been referring? A. Yes.

Q. Is there anything on that page which indicates that you indicated to read that statement before the House Committee on Un-American Activities only after you were sworn? A. Yes.

Q. Would you please, using that statement to refresh your recollection, tell us what it contained? A. "I am fully conscious of the fact that I had to speak under oath, and therefore I tried to speak to the best of my knowledge."

There the sentence ends.

Mr. Isserman: No further questions.

Recross Examination

By Mr. Hitz:

Q. On the next page, didn't you say:

"In order to save your time when it comes to questioning, I shall tell you what I am going not to answer"? A. Would you let me refresh my recollection, please?

The Court: Yes.

By Mr. Hitz:

Q. I just read it to you. On the next page, page 19, didn't you say that, Mr. Eisler? A. "In order to save your time when it comes to questioning, I shall tell you what I am going not to answer."

Right.

Mr. Hitz: That is all.

Further Redirect Examination

By Mr. Isserman:

Q. Mr. Eisler, if the Committee had directed you to read that statement at the end of your testimony, you would have done that; isn't that so? A. Absolutely.

Mrs. Carol King

Direct Examination

By Mr. Isserman:

Q. May we have your name, please? A. Carol King.

Q. You are an attorney, Mrs. King? A. I am.

Q. How long have you been a member of the Bar? A. Twenty-seven years.

Q. On or about October 1, 1947, was Mr. Gerhart Eisler one of your clients? A. What was the date?

Q. 1947. A. Yes.

Q. October, 1947? A. October, '47?

Q. I am sorry. I withdraw that question.

On or about October, 1946, was Mr. Gerhart Eisler your client? A. Toward the end of October, as I recall it.

Q. Did he consult you with respect to a subpoena
342 he had received from the Committee on Un-American Activities requiring him to appear in St. Louis on November 23, 1946? A. He did.

Q. And did he consult with you any subsequent time with respect to a subpoena which he had received requiring him to appear in Washington before the House Committee on Un-American Activities on November 22, 1946? A. He did.

Q. And did he later consult with you in respect to a subpoena he had received on January 24, 1947, requiring him to appear before the House Committee on Un-American Activities on February 6, 1947? A. In a somewhat limited way he did.

Q. Now, will you tell us whether or not you advised him as to procedure before Congressional investigating committees? A. I did.

Q. And what did you advise him?

Mr. Hitz: I object.

The Court: Objection sustained.

Mr. Isserman: May I make an offer of proof?

The Court: No, it is not necessary because I consider this subject matter irrelevant.

By Mr. Isserman:

Q. Did you give him advice on the law pertaining to the questions which a witness before the House Commit-
343 tee on Un-American Activities was required to answer?

Mr. Hitz: Please don't answer. I object.

The Court: Objection sustained.

Mr. Isserman: I would like to make an offer of proof in this connection.

The Court: No, you do not have to repeat that each time. I hold you do not need an offer of proof.

Mr. Isserman: Is Your Honor ruling that any question put to this witness relating to advice she gave the defen-

dant pertaining to his appearance before the House Committee on Un-American Activities will not be permitted?

The Court: Yes, I so rule and, therefore, it is not necessary for you to ask further questions along this line. My ruling applies to this entire line of questioning.

By Mr. Isserman:

Q. I would like to ask you just this one more question on qualification and I think I will be finished.

In your course of practice, Mrs. King, did you become familiar with the course of practice before investigating committees? A. I did.

Mr. Isserman: Now, in view of Your Honor's ruling, I have no further questions.

344 Mr. Isserman: If the Court please, the defense rests at this point.

Mr. Hitz: I have one rebuttal witness, Mr. Stripling.

Robert E. Stripling

Direct Examination

By Mr. Hitz:

Q. Mr. Stripling, inviting your attention to the first part of the hearing before the Un-American Activities Committee on February 6, 1947, and in particular to the first question that was asked Mr. Eisler by you with reference to taking the stand, which was:

"Mr. Stripling. Mr. Gerhart Eisler, take the stand."

Did you say that to Mr. Eisler? A. I did.

Q. Was that the first thing that you had said to Mr. Eisler after the meeting had convened that morning? A. Yes, sir.

Q. And to that did Mr. Eisler make this reply:

"Mr. Eisler. I am not going to take the stand."? A. Yes, sir.

Q. Did you follow that with the question: "Do you
345 have counsel with you?"

The Court: Mr. Hitz, isn't this already in the record?

Mr. Isserman: It is, if the Court please.

Mr. Hitz: Not what I am going to bring out.

The Court: I mean these questions and answers are in the record?

Mr. Hitz: Yes, these questions and answers are in the record of the Committee.

The Court: No, I mean in the record of this trial.

Mr. Hitz: They are in the record of this trial.

The Court: That being so I was wondering why you are repeating them.

Mr. Hitz: I am repeating them because they are the foundation questions to the questions I am leading up to, which is the rebuttal question.

The Court: Very well.

By Mr. Hitz:

Q. Did you then ask Mr. Eisler: "Do you have counsel with you?" A. I did.

Q. Was that your second question to him? A. It was.

Q. When you asked that question did you cut off the reply Mr. Eisler then made, which was, "I am not going to
346 to take the stand"? A. I did not.

Mr. Hitz: That, Your Honor, is the rebuttal question.

. . . . . .

The Court: Do both sides rest?

Mr. Isserman: Both sides rest, if the Court please.

Mr. Hitz: We rest.

The Court: Are there any prayers for instruction?

Mr. Isserman: Yes, sir.

The Court: You may hand them up and come to the bench and I will announce my ruling at the bench.

(Counsel for both sides approached the bench and the following occurred:)

Mr. Isserman: If the Court please, I would like time to prepare one additional instruction.

The Court: Give it to me orally. I will take it orally.

Mr. Isserman: We request the Court to charge that under Title 2, Section 192 of the U. S. Code, a witness before a Congressional committee is only required to answer questions which are pertinent to the matter under investigation.'

347 The Court: I shall decline to so charge because it is irrelevant to the issues in this case.

. . . . . .

349 Mr. Hitz: I have no prayers, but I would like to have the definition the Court is going to give on the word "wilful."

The Court: Yes, I have it prepared and I shall be glad to give it to counsel. I am going to give the same definition that I gave in the Fields' case:

By the term wilful is meant merely the failure or refusal to be sworn was not inadvertent, was not accidental, but was deliberate and intentional. The word wilful may also mean conduct marked by careless disregard of, or plain indifference to, the requirements of the statute. The word wilful does not mean that the failure or refusal to comply with the order of the committee must necessarily be for an evil or for a bad purpose. The reason or the purpose of the failure to comply, or the refusal to comply, is immaterial so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident.

Mr. Isserman: We would like to object to that portion of the charge at this time.

. . . . . .

350 The Court: You have a motion, Mr. Rein?

Mr. Rein: I would like to make it at the counsel table.

The Court: No, you will make it right here. I will not hear argument. Just state the grounds. Our practice, ex-

cept under unusual conditions, is to make these motions at the bench.

Mr. Rein: I would like to make a motion for acquittal at this time, and I will state the grounds.

The Court: You need not repeat the grounds you have heretofore raised, but if you have any additional grounds.

Mr. Rein: To make certain, Your Honor, that I have all the grounds stated I would like to state them, and I won't be very long.

The Court: Make it very brief.

Mr. Rein: The first ground is that the defendant is an alien in transit in this country, and was not subject to subpoena before—

351 The Court: Now, you have already made that and I have denied it.

Mr. Rein: I am not going to argue it.

The Court: Very well, next.

Mr. Rein: And the next ground is that since the defendant was arrested as an enemy alien he was entitled to all the rights of a prisoner of war, and, therefore, could not be required to testify.

The Court: I shall deny that. I have already passed on this point on the motion to dismiss prior to the trial.

Mr. Rein: The third ground, that the indictment fails to state an offense since a refusal—

The Court: That is enough. We have argued that before and I overrule that.

Mr. Rein: The fourth ground, that there is insufficient evidence to go to the jury on which a finding of guilty can be had.

The Court: I shall deny the motion on that ground.

Mr. Rein: I would like to state a little more fully my ground on it as I haven't stated it before, Your Honor.

The Court: Yes.

Mr. Rein: One is—

The Court: No, I will not hear argument on that. I have already ruled that the question of wilfulness is a question of fact for the jury.

352 Mr. Rein: I am not talking about wilfulness.

The Court: All right.

Mr. Rein: I am talking about the question of fact that if the defendant refuses to be sworn—

The Court: That has already been argued.

Mr. Rein: I would like to point out that the defendant protested against his arrest; then Representative Thomas stated that the proper time for the defendant to make an objection about his arrest, and make an objection to being sworn, was before being sworn; that Representative Thomas also stated that he did not know what the contents of the statement would be; that the contents of that three-minute statement was directed to his being sworn—

The Court: I have heard enough on that. I think there is enough for the jury. The next ground.

Mr. Rein: The next ground is the failure of the Government to show that the default was wilful.

The Court: I have already ruled that is a question for the jury and not for the Court.

Mr. Rein: The next ground is that since the defendant was brough to the hearing in custody he did not appear voluntarily before the Committee and, therefore, could not be wilfully in default.

The Court: Motion denied.

Mr. Rein: The next ground is on the failure of the
353 Government to prove matters of inquiry on which it wished Mr. Eisler to be sworn and give testimony.

The Court: I shall deny that because I hold that is not an issue in this case in view of the fact that the defendant had not have the right to be informed as to what the questions were going to be if he took the oath.

Mr. Rein: The next ground is that the Committee unlawfully procured the defendant's arrest to assure his appearance before the Committee.

The Court: Denied.

Mr. Rein: The next ground is that the Committee was not interested in securing testimony from the defendant, but was proceeding instead to harass and persecute him for

his political beliefs and to prevent his departure from the country.

The Court: I shall deny the motion on this ground, with the additional comment that there is no evidence in this case because I have excluded all that.

Mr. Rein: And the final ground that the resolution establishing the House Committee on Un-American Activities is invalid.

The Court: Motion denied.

354 Mr. Isserman: We request the Court to charge that the intent of the witness to answer or not answer any questions which may have been put to him by the Committee after his being sworn is immaterial to any issue in this case.

The Court: What do you say about that?

Mr. Hitz: I would like to hear that again, Mr. Isserman.

The Court: I am inclined to think it is proper. Read it.

(The statement of counsel was read by the reporter.)

The Court: I think that might have been made by the Government because it is a double-edged sword. I will grant that.

Mr. Isserman: I think that is a proper instruction.

The Court: I have ruled right along that what might have happened after the witness had been sworn was immaterial.

Mr. Isserman: If the Court please, I have drafted it orally and I would like to withdraw it and prepare it in writing because it is our belief that if he did intend to be sworn that goes to a question of good faith, and I am limiting it and amending it to answer any specific questions which might have been put to him by the Committee.

The Court: Denied

358 **Argument to the Jury on Behalf of the Defandant.**

Mr. Isserman: May it please the Court and members of the jury: This is the defendant's opportunity, and only opportunity for counsel on his behalf to argue to you that he is not guilty under the charge in the indictment.

The indictment says that he wilfully refused to be sworn and make the oath when he was requested to.

Counsel regrets that the jury was required to sit through a trial which seemed to be prolonged for reasons which apparently, and under the Court's rulings were not concerned with the jury, but under our system of law and under our procedure, when counsel for the defense feels certain matter is relevant and it presents it to the Court, and the Court rules it out then it ceases to be an issue for the jury.

We are inclined to agree with Mr. Hitz when he says that the issues in this case are very narrow and deal with what happened in the hearing room in the few minutes, because it was only a few minutes that Mr. Eisler was there on February 6, 1947, and we say that they are narrow because of the rulings made by the Court which make them narrow.

359 Now, then, at the outset I believe I should say that whatever Mr. Eisler was going to answer to any specific question about his biography, or about his friends, has nothing to do with this case. We do think that his actions in the hearing room, until he was taken out, has everything to do with this case, and the question before you is whether or not Mr. Eisler wilfully made default.

Before summarizing those few minutes in the hearing room I think it might be well to review what was said about those few minutes in the early part of the trial. You will remember Mr. Hitz in his opening statement said that the defendant had in his hand, that the defendant wanted to read a statement which he had in his hand and was waving around in the air. Mr. Hitz said he would prove that to you. We say that his statement he would prove it is, of course, no proof of what happened. You will recall in the beginning that Mr. Thomas said he had nothing in his hand,

and then I think Mr. Stripling said he had some papers in his hand, and the defendant himself testified that he had a few sheets of yellow paper similar to this paper I have in my hand here on which he had written a few notes and, of course, there is nothing in the evidence at all which indicated that he was waving any statement, or wanted to read any particular statement at the time he was called.

Now, Mr. Thomas at the beginning said Mr. Eisler made no request to make any statement at the hearing, and Mr. Thomas said that all that Eisler said was "No." He
360 did not even recall that Mr. Eisler had asked for three minutes in which to make a few remarks. Now, I think that is of some significance in this case because actually as we know now, Mr. Thomas later corrected the statement of fact. I think it is significant to understand, or to summarize why Mr. Thomas at the beginning said Mr. Eisler made no request to the Committee and that all that Eisler said was "No," because of the frame of mind of Mr. Thomas, and we say Mr. Thomas had that frame of mind on the morning of February 6 when he was Chairman of the House Committee on Un-American Activities and Mr. Eisler appeared before it, because apparently he treated every statement Mr. Eisler made as if Mr. Eisler would say, "No," and because he treated every statement that way in very short order, and not with the deliberate procedure that we know in a courtroom, but in very short order Mr. Eisler was practically rushed off the witness stand.

Later on you will remember on cross examination of Mr. Thomas, because we knew that you, the jury, wanted to know everything that happened that morning, he refreshed his recollection by reading the transcript, and you will remember he said in his opinion the transcript was very, very correct, and that if there was any conflict between his testimony of the day before and what he was reading in the transcript that the transcript really told the story.

Now, I think if is important for us to analyze what
361 story this transcript told. Was it a story of a blanket "no"? Was it a story of a wilful refusal, or

was it a story of a witness who believed he had a right to make an objection, and we will talk more about that in a few minutes, who was trying to make an objection and was not allowed to make it because Mr. Thomas did not know what the objection was but he wouldn't let the witness say what the objection was. In other words, this is a situation of putting Mr. Eisler in a spot where he couldn't make objection, or to make a few remarks to show what the objection was, and I think as we go through this testimony we will show that there was no wilful refusal on Mr. Eisler's part, but rather a wilful refusal of the Committee to take lawful procedure which you, as the jury in this case, have heard taken time and time again; you have heard counsel object before an answer is given. You have heard counsel object before things are done because you know the rule is if you object afterward it is too late. Now, that procedure which was so prevalent in this courtroom indicated that when counsel made an objection it was merely that counsel was trying to get a ruling in his favor on behalf of his client on a particular point, and ordinarily in our procedure when there is a ruling against you you go to the next point.

Now, that kind of procedure was missing that morning in the Committee room, and before going into what actually happened I think it is important to read from the
362 record Mr. Thomas' own words, not the words of our witness but Mr. Thomas' words, that the defendant in this case had a right to make an objection, and what did Mr. Thomas say?

Mr. Hitz: What page?

Mr. Isserman: Here is my question on page 136 of the transcript:

"Mr. Thomas, if a witness wants to object because he believes he has legal reasons why he should not be sworn, how does your committee give him that opportunity under its procedure?"

A simple question, what procedure does the committee have if somebody wants to object.

"He should certainly, at least, attempt to make some statement as to his legal objections," and then Mr. Thomas goes on to say, "but in this case there was no statement made as to his legal—" and that is where it finishes.

Mr. Thomas said the witness should certainly attempt to state his legal objections.

Now, how did Mr. Thomas know that Mr. Eisler was going to state a legal objection or wasn't going to state a legal objection?

"Do you know what remarks Mr. Eisler was going to make in the three minutes he asked for?"

And on the next page we find Mr. Thomas saying, when the question was read to him which I read to you, "Do you know what remarks Mr. Eisler was going to make in
363 the three minutes he asked for?" Mr. Thomas said:

"When he first asked for the three minutes, no; but—" and there is nothing in this record to show that Mr. Thomas, who was conducting this hearing, knew what the witness was going to say in those three minutes, and if he didn't know what the witness was going to say how could Mr. Thomas know that there was no legal objection going to be made, and remember Mr. Thomas had said, and quite correctly, because it is the fundamental American procedure, that when you think you are being kicked around for anything by anyone that you have a right to object. Maybe that is one of the first things we Americans learn, is the right to object when we think somebody is stepping on our toes. We might be wrong, and the ruling is made against us, but the right to object is fundamental, and so Mr. Thomas was merely stating a very fundamental legal principle, but did he live up to that principle, and we say he did not, because he did not allow Mr. Eisler, the defendant, to say anything until he was sworn. Now, you cannot object to being sworn after you are sworn, it is too late, and yet Mr. Thomas did not give the defendant that right.

Now, Mr. Thomas said he did not know what the remarks were, and we will show that nobody knew what the remarks were because there was no chance to speak them, but there

is evidence in the case exactly as to what the remarks were to be about, and it is in there notwithstanding the
364 strict ruling of the Court which made it impossible for Mr. Eisler to say what he was going to say in those three minutes.

The Court: I think you should not refer to rulings of the Court.

Mr. Isserman: I as sorry, Your Honor.

He said on page 312 of the testimony, in answer to a question which I put on page 311, and my question was as follows:

"Mr. Eisler, why did you ask the Committee for three minutes to make some remarks before you would be sworn on the morning of February 6, 1947?"

"Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person."

Because I had objection against the whole, what I considered unlawful proceedings of this Committee against my person.

Now, that statement is uncontradicted in this record. Nobody else knew what he wanted to say because no one gave him a chance to say before the Committee what he wanted to say, so this statement that he wanted to state his legal objections before being sworn, in accordance with the Committee procedure which Mr. Thomas has heretofore testified to, was all he wanted to do and he was not allowed to state that objection.

365 Now, I would like to go through the record of that morning as it was read to you, practically read to you by Mr. Thomas from the record: "Mr. Gerhart Eisler, take the stand," and Mr. Eisler said, "I am not going to take the stand."

Now, Mr. Eisler said what his recollection of that is, that he was not going to take the stand until he has made a few remarks. Well, the record does not show, but sometimes there is in the record, as in this case, the names of the two security officers, whose names appear in the record incor-

rectly and had to be corrected, and in this record we have had to correct the record because stenographers make mistakes as they go along, but there wasn't, and this does not depend on Mr. Eisler's recollection, but the fact is that after he made the statement that he was not going to take the stand, he told him to take it a few minutes after that and I believe his testimony was that he walked over to the witness stand with Mr. Stripling, so whether or not the recollection of Mr. Eisler is correct the fact is that he did take the witness stand at the very beginning of the hearing.

Then the Chairman said, a little further along, "Mr. Eisler, will you raise your right hand?" "Mr. Eisler, will you raise your right hand?" Mr. Eisler said, "No. Before I take the oath—" Now, that is not finished, that sentence. "Before I take the oath," is all he had a chance to say when Mr. Stripling said, "Mr. Chairman," so the witness was in the middle of a sentence. Mr. Stripling
366 ling said, "Mr. Chairman," and then Mr. Eisler said, "I have the floor now." We might have said it differently. We might have said, "I haven't finished the sentence," but he said, "I have the floor," which meant he wanted to make a statement before he took the oath and make a few remarks in connection with my arrest.

Then the Chairman said, "Sit down, Mr. Eisler." And then he said, "Now, Mr. Eisler, you will be sworn in. Raise your right hand."

Mr. Eisler said, "No."

The Chairman said, "Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation," and I presume that referred to the fact that Mr. Eisler came here on a transit visa enroute to Mexico, and for reasons not disclosed here, and I don't go into that; and he said, "I am a political prisoner in the United States."

Now, that may well have been, and undoubtedly was, the beginning of his objection, because counsel in this case has made certain offers of proof in this Court which relate to that problem—

The Court: You may not refer to evidence which was excluded even indirectly by indirection.

Mr. Isserman: Then he said, "I am a political prisoner in the United States" and wanted to go on to state his objection, and then the Chairman said, "Just a minute. Will you please be sworn in?"

367 Mr. Eisler, "You will not swear me in before you hear a few remarks." I would have said, being a lawyer, "I will not be sworn in until I have made my objection," but as long as he made objection, whether he said, "objection" that is the only thing that counted.

Now, the Committee could have found out, and perhaps have avoided this whole trial of days by one question which is significant by its absence because if you knew as jurors, or if I knew as a lawyer he had said, "I have an objection and I want to make a few remarks," the important thing would be, "What are the remarks about?" because he had a right to make that or some other kind of remark, but at no place in this morning, or while Mr. Eisler was in that room, did the Chairman, the secretary, or any committee member try to find out from him by a simple question, "What remarks are you going to make," because if he had been asked that question and been allowed to answer he would have said, "I am making a legal objection to this line of procedure," framed in layman's language because he was not a lawyer, but he was not permitted.

Then the Chairman said, "No; there will be no remarks." He did not say, "What are the remarks," but simply that there will be no remarks, and then Mr. Eisler said, "Then there will be no hearing with me," because he undoubtedly knew he would have to make the objection before the hearing proceeded. If the objection would have been

368 overruled the hearing would have gone on, and he knew that the objection had to be made first, just as in this case, that the objection has to be made first and not afterwards.

The Chairman said, "You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?"

Mr. Eisler said, "I am ready to answer all questions, to tell my side." You will remember he was under some charge.

The Chairman said, "That is not the question. Do you refuse to be sworn in?"

Mr. Eisler said, "I am ready to answer all questions," and at that point, instead of inquiring to see what the remarks were, to see if Mr. Eisler did want to make an objection, the Chairman said, "Mr. Stripling, call the next witness."

No opportunity, when the Chairman was already calling the next witness, to state a legal objection, and remember Mr. Thomas said the witness had that right. Well, if he had the right he should have been given the opportunity. If they believed he was not going to state a legal objection they should have asked him, "What are you going to state," and while we are on that the State tried to prove, or would have you believe, that Mr. Eisler was going to read a twenty mimeographed paged article in three minutes which he said it would take at least an hour to read, twenty mimeographed pages. I think that is a matter of common knowledge, it would take more than three minutes, or ten minutes,
369 to read that bulky statement. If he had started to read that statement in three minutes, maybe at that point when he was just about finished the first page the Chairman would have stopped him. There is no possibility that Mr. Eisler could have read that statement in three minutes, and remember that statement was finished on February 2nd, even before Mr. Eisler was arrested. It was finished at that point, and on page 18 Mr. Eisler said, "I know that I am speaking under oath. That is why I have been very careful about what I said;" but the important point is that he put it in the mimeographed stencil, and was going to give it to the press, and knew that he was making the statement under oath. Certainly it shows he was not going to make that statement in three minutes if he was allowed to make a few remarks, and remember in

the meantime he had been arrested illegally and brought down to Washington under guard even after he had made his arrangements to come, including hotel reservations, and then these things, his arrest happened, and if that had happened to you, or me, or anybody else, you would have boiled with anger inside, and you would have objected at the first opportunity, and this was the first opportunity he had, and Mr. Thomas said he was deprived of that right, and when he is deprived of that, he is, as I see it, being wilfully deprived of his rights, and that it what this case is about. I think Mr. Eisler was deprived of his legal right to make a statement at this hearing. Now, what the purpose of the Committee was in denying that is not important, but the fact that he was denied that simple right was, and is very important here. They admit he should have said to him, "What kind of remarks do you want to make?"

The Court: Mr. Isserman, if this is a convenient time, I want to say that you have five minutes more.

Mr. Isserman: Thank you.

Remember, he had some notes in his mind, and he wanted to make a few remarks, and it was also a sworn statement, but the Committee would not allow him to do it, but this is what he said, "I have never refused to be sworn in," and it was after that point, and he was still on the stand, "I have never refused to be sworn in, I came here as a political prisoner, I want to make a few remarks, only three minutes, before I will be sworn in and answer your questions and make my statement," so that in his mind it was very clear: first the objection, then the swearing in, and then the answering of the questions, and then the making of the statement, and it is all here in this one sentence. Now, that does not show a wilful default but it shows a willingness to reply, simply stating his right to make an objection which would be three minutes, and even if it had taken longer than three minutes it was still his privilege. Now, we say it is the failure to give him that three minutes,

the failure to allow him to object, the very thing Mr.
371 Thomas said he had a right to do, but he is brought into this courtroom, and there is no one in this courtroom to say, no one in this courtroom, or member of this jury, that if he had been given his legal right to object before being sworn in that he would not have continued on through to the end, and if he had done that he might have been here before you on another charge, but that is what we are concerned with here. Mr. Eisler wanted to object to being sworn. He was not allowed that objection, and it was wrong, wilfully wrong not to have allowed him to make that objection.

We say again that upon these facts there is no wilful default, it was merely something each and every one of you would have done, and we do not blame individuals for standing up for their rights; it is still and always will be a good American principle, and in view of everything you have heard in this case, I am sure you are not going to penalize Mr. Eisler for failure to state an objection which he had a right to make; I think you will not do that.

372 **Closing Argument on Behalf of the United States**

Mr. Hitz: May it please the Court and members of the jury: I had intended to read to you the testimony before the committee, but Mr. Isserman has just read that portion, so it will be unnecessary, and I shall take no more of your time in referring in any detail to that, except to say this: that Mr. Isserman at this time, and Mr. Eisler, and other people who have testified for him, are endeavoring to show that the so-called statement—so-called 3-minute statement—which at times was referred to by Mr. Eisler as "remarks," was in effect not remarks, was not a statement, was not a speech, but was, according to Mr. Eisler and Mr. Isserman, a series of legal objections to the proceedings that were going on—legal objections to Mr. Eisler himself being before that particular committee.

But it is significant that Mr. Eisler, who was represented by counsel at that time, and who had, he says now, but did

not say them, a number of legal objections to the proceedings and to his being there, never said what he was going to say in his statement. He never announced to them that "I feel I have certain rights I have to talk to you about, and I have certain objections to the legality of the proceedings here, which I believe to be unconstitutional," and so on, as he was about to go on here. He did not say that.

He did not use the word "objections." He did not
373 use the words "illegality," "legality," "constitutional," or any of the other words.

So, of course, Mr. Thomas, according to Mr. Isserman, testified here that no attempt was made by Eisler to make any legal objections. He made no legal objections—no attempt—so far as the committee was concerned. It is Mr. Eisler who is putting his word up as to what he intended, as to what he thought was going on, against the word of Mr. Thomas himself, who was conducting the proceedings.

These particular proceedings were very well conducted. The testimony of Mr. Thomas was given carefully; it was that of a moderate, careful, truthful man.

When he was asked a number of questions by Mr. Isserman as to whether this did not take place, and if the record shows that, would he say the record was wrong, Mr. Thomas said, "No, of course I would not. If there is any conflict in my testimony about the proceedings and the record, I will take the record."

We have not heard the words "legality," "constitutional," or "objections"; in fact, the word "remarks," as to what Mr. Eisler stated that he wanted to say to the committee before being sworn, is not consistent with the testimony that took place or the proceedings that took place there, and is not consistent with reference to what it was he had in mind doing, because he later referred to the so-called remarks as "the statement." He had a state-
374 ment—a 3-minute statement. I think he tried to impress the committee with the fact that what he held in his hand was something that he could read in 3

minutes. I do not think he had any other statement in mind or in hand or anywhere else.

In addition to that, it was not only referred to as a set of remarks, but in his final refusal to take the stand and to be sworn as a witness, he used the word "speak." I shall read the last several questions that were put to him. This is on page 3.

"The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why, it will be agreeable to the committee. But first you have to be sworn."

There could be no more moderate, no more tempered statement than that to any witness, no matter whom he may be.

"Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing."

"The Chairman. Then you refuse to be sworn?"

"Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement."

He wanted to impose conditions on the conducting of the hearing by Mr. Thomas, who was chairman of that committee.

"The Chairman. We will give you those 3 minutes when you are sworn."

375 "Mr. Eisler. I want to speak before I am sworn."

Do you think he intended there to make any legal objection? He wanted to make a speech, as he was attempting to do several times while he was testifying in this case.

Mr. Isserman: If the Court please, I would like to object to the remarks of the prosecutor on the ground that there has never been in the evidence—

The Court: The objection is noted.

Mr. Hitz: It was with great difficulty that he was stopped at times by me and finally, with great difficulty, by the

Court. I dare say had he started to launch off into reading this 20-page statement here not under oath, or if it were under oath, I do not think anybody could have stopped him, unless those guards from Ellis Island could have done so.

I do not intend further to make reference to the evidence in this case. I can only say that whether or not an objection was made—we say it was not; Mr. Thomas, who was there, said no objection was made—it makes no difference whether it was made or not, because if there is a mistake of law with respect to what a man believes his rights are before one of those committees, it is no defense to the charge of contempt. His Honor will charge you that it makes no difference anyway.

In conclusion, I believe that after you have weighed all the evidence and you have heard the careful presentation of the case by the defense counsel—and they are very
376 able—and the very able summation of the evidence as they saw it, nevertheless your verdict will be a speedy one of guilty, which I am sure you will return with very little hesitation in your jury room; and that you will announce to the world that nobody, no matter who he may feel he is, or where he is from, can be allowed to defy the elected representatives of the American people.

377 **Charge to the Jury**

The Court (HOLTZOFF, J.): Ladies and gentlemen of the jury: As this is the first case in which the members of this panel have participated at this term of court, I am going to make my instructions and my charge to you in considerable detail.

The defendant, Gerhart Eisler, is on trial before this court on a charge that is generally known as contempt of Congress; namely, that he was summoned to testify before a committee of the House of Representatives, that he appeared before that committee but refused to take the oath that is administered to witnesses, and thereby frustrated the desire and the attempt of the committee to obtain tes-

timony from him. It now becomes your duty to determine whether the defendant is guilty or not guilty of the offense with which he is charged. The only question for you to consider and to determine is whether the defendant is guilty or not guilty of the specific charge on which he is being tried. All other matters that might have crept into this case are extraneous and should be ignored and disregarded by the jury.

At the outset, I want to advise you that the Congress has the power to conduct investigations in order to secure information needed by the Congress in connection with the enactment of legislation. Such investigations may be conducted by the Congress through its committees.

378 Some time ago the House of Representatives created a committee known as the Committee on Un-American Activities. The function of that committee is to investigate un-American propaganda activities. This is a subject which the Congress, through one of its committees, has authority to investigate.

In the course of its investigation, the committee summoned Gerhart Eisler to testify as a witness. The defendant, Eisler, appeared before that committee, and it is charged that when he was called as a witness and directed to take the oath that is administered to all witnesses, he declined to do so and thereby made it impossible for the committee to question him as a witness, and thereby, in the language of the statute, made a willful default.

It is the function of the Court—that is, it is my function and my duty—to instruct the jury as to the law applicable to the case. You are bound and obligated to follow the Court's instructions as to the law. But you, ladies and gentlemen of the jury, are the sole judges of the facts, and you must determine the facts for yourselves solely from the evidence adduced at this trial.

The Court is permitted to discuss the facts and the evidence and to comment on them in order to assist the jury in arriving at its conclusions. But the Court's comments

on the facts and on the evidence are not binding on you,
and you need attach to them only such weight as you
379 deem wise and proper. The final decision on the
facts is entirely within your domain. My instructions are binding on you only as to the law.

I shall discuss, first, a few of the general principles of law that must bind you and guide you in your deliberations. The fact that a defendant has been indicted and is charged with a crime is not to be taken as an indication of guilt. An indictment is the mere machinery and the procedure by which a defendant is brought before the Court and is placed on trial.

The law is that every defendant in a criminal case is presumed to be innocent. This presumption of innocence attaches to him throughout the trial. The burden of proof is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, the jury must find him not guilty.

Now, mark my words. I said that the burden of proof on the Government is to prove the defendant guilty beyond a reasonable doubt—not beyond any doubt whatsoever. The Government has the burden of proving the defendant guilty to a moral certainty and not to an absolute or mathematical certainty.

By a reasonable doubt, as its name implies, is meant a doubt based on reason, a doubt for which you can give a
reason to yourself, and not just some whimsical spec-
380 ulation or some capricious conjecture.

The words "proof beyond a reasonable doubt" sometimes seem quite formal, and I like to explain the meaning of that phrase, for this very reason, in simple, everyday phraseology. Proof beyond a reasonable doubt simply means this: If after an impartial comparison and consideration of all the evidence you can say to yourself that you are not satisfied of the defendant's guilt, then

you have a reasonable doubt. On the other hand, if after such impartial comparison and consideration of all the evidence you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt. In other words, proof beyond a reasonable doubt is such proof as will result on your part in an abiding conviction of the defendant's guilt, such a conclusion as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

In determining whether the Government has established the charge against the defendant beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses and all of the other evidence in the case, as well as all the circumstances concerning which testimony has been introduced.

You are the sole judges of the credibility of the witnesses.

381 By that I mean that you, and you alone, are to determine whether to believe any witness and the extent to which any witness should be credited. In reaching a conclusion as to the credibility of any witness and in weighing the testimony of any witness, you may consider the demeanor and the behavior of the witness on the witness stand, the witness' manner of testifying, whether he impresses you as a truth-telling individual, whether the witness impresses you as having an accurate memory and recollection, and whether the witness has any interest in the outcome of this case. All of these matters, as well as any other factors that appear to you as having a bearing on the matter, you may consider and weigh in determining what witnesses to believe and to what extent to credit them.

I shall now pass on to a consideration of the specific charge on which the defendant is being tried. The prosecution in this case is being conducted under a statute known as Section 192 of Title 2 of the United States Code. The

pertinent provisions of this statute are very short and very simple. They read as follows:

"Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony upon any matter under inquiry before either House, or any committee of either House, of Congress, wilfully makes default shall be deemed guilty of a misdemeaner."

Refusal to be sworn as a witness after appearing
382 before a committee pursuant to this summons is a default within the meaning of the statute, because refusal to be sworn completely frustrates any desire or attempt of the Congress to procure testimony from the prospective witness. But, as this statute says, this default, in order to be punishable, must be willful.

Now, what is mean by the term "willful"? By the term "willful" is meant merely that the failure or refusal to be sworn—the refusal to take the oath—was not inadvertent, was not accidental, but was deliberate and intentional.

The word "willful" may also mean conduct marked by careless disregard of or plain indifference to the requirements of law. The word "willful" does not mean that the failure or refusal to comply with the order of the committee must necessarily be for an evil purpose or for a bad purpose. The reason or the purpose of the failure to comply, or the reason for the refusal to comply, is immaterial, so long as the refusal was deliberate and intentional and was not a mere inadvertence or an accident.

The questions for the jury to determine are twofold: First, whether the defendant, Eisler, having appeared before a committee of the House of Representatives pursuant to a summons, refused to take the oath which was about to be administered to him as a witness; and, second, whether the defendant's refusal to take the oath was willful, bearing in mind the definition of the term "willful" that I
383 gave you a few moments ago.

Of course, willfulness cannot be proved directly. Willfulness is a state of mind, and it is impossible to fathom

the operations of the human mind directly. There is no X-ray machine that can photograph what is going on in the brain of another person. Willfulness may be inferred from circumstances. That is the only way a state of mind can ever be proved. Willfulness may be deduced from the person's conduct, from the things that he does, from the things that he says, as well as from the surrounding circumstances. This question is peculiarly a question of fact for the jury to determine.

In this case it appears that the defendant was requested by the Chairman to take the oath several times, but on each occasion the defendant either refused categorically or refused except on certain conditions, that he specified. The fact that the defendant was given several opportunities to take the oath, but that on each occasion he declined, is a circumstance that the jury may consider in determining whether his default was willful.

As I understand it, the defendant contends that he wanted an opportunity to make a statement concerning his arrest before he was sworn. The law is that a witness does not have the legal right to dictate the conditions on which he will or will not take the oath as a witness, or the conditions on which he will or will not testify. Even if the
384 defendant believed or was advised that he could refuse to be sworn and to testify except on his own terms, this fact is no defense. A mistaken view of the law does not excuse the defendant and is no defense in this case.

To summarize my instructions to you, I may say this: If you find that the defendant, Gerhart Eisler, having appeared before the House Committee on Un-American Activities pursuant to subpoena or summons, refused to take the oath to be administered to him as a witness, and if you further find that his refusal to do so was willful, you may bring in a verdict of guilty. Of course, if you find otherwise, your verdict should be not guilty.

Now, as I said to you in the opening of my remarks, ladies and gentlemen of the jury, my discussion of the evi-

dence is not binding on you. If my recollection or my understanding does not accord with your recollection or understanding of the testimony, then your recollection and your understanding must prevail, because you are the sole judges of the facts, and my discussion of the evidence is not binding on you.

I want you to take this matter and to consider it carefully and deliberately in the light of the instructions which I have given you. This is a simple case, ladies and gentlemen of the jury. Use the same ordinary common sense, the same practical approach, and the same ordinary intelligence which you would employ in determining any other important matter that you have occasion to decide in the course of your own everyday life.

The verdict of the jury must be reached by a unanimous vote, and each juror must concur in the verdict. Your verdict should be either guilty or not guilty.

Are there any exceptions, gentlemen? If so, you may state them at the bench.

(Counsel for both sides approached the bench, and the following occurred:)

Mr. Isserman: In behalf of the defendant, I desire to object to the following directions to the jury made by the Court: The Court's statement to the effect that refusal to be sworn is a default under the statute; secondly, the Court's definition of the term "willful" and the Court's explanation of that term in every respect. I might say that the last two objections are based upon the ground that we believe it to be an incorrect statement of the law.

The Court: You do not have to explain why you object.

Mr. Isserman: I understood we had to state each ground.

The Court: No; just note your exceptions.

Mr. Isserman: To the Court's statement that the defendant was requested to be sworn on several occasions and that on each occasion he either refused or refused on certain conditions, which he imposed. We believe that to be an incorrect summary of the facts.

386 To the Court's statement to the effect that the defendant wanted an opportunity to make a statement concerning his arrest before being sworn, on the ground that that is an incorrect statement of the facts.

To the Court's statement to the effect that the law is that a defendant has no right to state conditions, without adding thereto that the defendant did have a right to make a legal objection to being sworn.

If the Court please, may Mrs. King state an objection she has noted?

The Court: Yes.

Mrs. King: If the Court please, we object to the instruction—

The Court: Just a moment. You will have to talk in an undertone, so that the jury cannot hear you.

Mrs. King: We object to the instruction that the Committee on Un-American Activities had a right to investigate un-American propaganda activities, upon the ground—

The Court: Do not state your ground; just state your objection; we cannot hear argument on objections.

Mrs. King: That his refusal to be sworn made it impossible for the committee to question him.

Mr. Isserman: Mr. Rein has one objection he has noted, your Honor.

The Court: Of course, the general rule is that
387 only one counsel makes objections. But go ahead.

Mr. Rein: One brief one, your Honor. I would like to note an exception to the Court's statement that it is the defendant's contention that a witness has the right to state the conditions on which he would testify before the committee.

The Court: I do not think that is a correct statement of what I said. If it is, your exception is noted.

Mr. Hitz: Your Honor, I have one remark only, and this concerns the defense. Mr. Isserman said that he objected to a statement by the Court that it was Eisler's intention to make certain preliminary remarks in a statement concerning his arrest and internment, so called. I agree

that perhaps there is an intimation here that more than that would have been said, so I would have no objection, if the Court saw fit to do so, to saying: and to make other legal statements, or rather statements, to the committee with respect to his appearance there.

The Court: Well, I based my statement on the portion of the testimony to which Mr. Isserman directed my attention this morning, namely, that Mr. Eisler said that he wanted to state objections concerning his arrest. I do not recall the page number.

Mr. Isserman: I would like to give your Honor the specific page reference.

The Court: Yes; do you have it?

Mr. Isserman: Page 312.

388 The Court: The question by Mr. Isserman was:

"Mr. Eisler, why did you ask the committee for 3 minutes to make some remarks before you would be sworn on the morning of February 6?"

"Answer. Because I had objection against the whole, what I considered, unlawful proceedings of this committee against my person."

I think that is broader than what I said concerning his arrest. I think I will charge the words "arrest and unlawful proceedings."

Mr. Isserman: Would your Honor add: before the committee?

The Court: Oh, yes. I will read this answer.

Mr. Hitz: And to that would be, of course, added the same instruction that it makes no difference?

The Court: Yes, of course.

Mr. Isserman: We would like to enter an objection to the charge as a whole.

The Court: There is no such thing. You may enter it; it is of no value.

Mr. Isserman: I would like to object also to that portion of the charge that states that the defendant was present in

response to a subpoena. I believe your Honor charged that.

The Court: Very well.

(Counsel returned to the trial table, and the following occurred:)

389

The Court: Ladies and gentlemen: I am going to expand one little statement that I made to you. I have stated that the defendant contends that he wanted an opportunity to make a statement concerning his arrest. In order that there may be no ambiguity, I am going to read to you what the defendant said on the witness stand concerning this matter.

Mr. Hitz: That is, in this proceeding he said it.

The Court: Yes.

He was asked:

"Why did you ask the committee for 3 minutes to make some remarks before you would be sworn on the morning of February 6?"

His answer was on this witness stand:

"Because I had objection against the whole, what I considered, unlawful proceedings of this committee against my person."

This states his contention in his own words; but I want to repeat again that a witness does not have the legal right to dictate the conditions on which he will or will not testify, or to insist on making a statement as a condition of taking the oath as a witness.

Mr. Isserman: If the Court please, may I approach the bench?

The Court: You except to that; it may be noted.

390

Mr. Isserman: I am excepting to that latter portion.

The Court: Yes; that may be noted.

395 **Defendant's Requests to Charge**

1. If the defendant was advised by counsel and believed that he was entitled to object to the procedure to which he was subjected his refusal to be sworn until he had had an opportunity to make a statement did not constitute the wilfulness required by the statute under which he was indicted.

Denied. A. H.

2. The jury in considering whether the defendant wilfully made default should consider all the facts and circumstances under which the defendant was brought to Washington before the Committee on Un-American Activities.

Denied. A. H.

3. The jury in considering whether the defendant wilfully made default should consider all the facts and circumstances under which the defendant appeared in Washington before the Committee on Un-American Activities.

Denied. A. H.

4. In determining whether the defendant wilfully made default the jury must acquit the defendant unless they believe he had an evil purpose and intent in refusing to be sworn.

Denied. A. H.

396 5. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that he wilfully made default.

Granted in substance. A. H.

6. The jury are the sole judges of whether the defendant wilfully made default and must acquit the defendant unless they are convinced beyond a reasonable doubt that his refusal to be sworn was for the purpose and with the intent of interfering with the investigation of the Committee on Un-American Activities.

Denied. A. H.

7. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that the refusal of the defendant to be sworn was not due to an honest belief that the procedure to which he was subjected was unlawful.

Denied. A. H.

8. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that the defendant was unwilling to be sworn and testify after he had made a three minute statement.

Denied. A. H.

9. The jury must acquit the defendant unless they find beyond a reasonable doubt that the defendant had a premeditated and deliberate design to refuse to testify before the Committee.

Denied. A. H.

397 10. The jury must acquit the defendant if they find that he was willing to be sworn and testify after he had made a three minute statement.

Denied. A. H.

11. The jury must acquit the defendant unless they find beyond a reasonable doubt that his request to make a three minute statement did not arise from the circumstances of his being brought before the Committee in custody.

Denied. A. H.

12. Wilfully in this case means with a bad purpose and evil intent.

Denied. A. H.

13. To find that the defendant acted wilfully in this case the jury must find beyond a reasonable doubt the defendant's conduct was a result of a premeditated and deliberate plan to refuse to testify before the Committee.

Denied. A. H.

14. In order to find the defendant guilty the jury must find that the defendant refused to testify after being given a full opportunity by the Committee to state his objections to the circumstances of his arrest.

Denied. A. H.

15. If the jury finds that the only issue in controversy between the defendant and the Committee was one of procedure; whether he should make a three minute statement before or after he was sworn, then they must return

398 a verdict of acquittal.

Denied. A. H.

16. If the jury finds that the defendant's conduct was the result of an honest belief of his rights before the Committee, whether such belief was legally correct or not, then they must return a verdict of acquittal.

Denied. A. H.

17. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that he would have refused to testify under oath after having objected to the proceedings against him by the Un-American Activities Committee.

Denied. A. H.

18. The jury must acquit the defendant unless they are convinced beyond a reasonabl doubt that he would have refused to testify under oath after he had objected to being sworn.

Denied. A. H.

19. If the jury find that the defendant before he was sworn desired and attempted to make objection to the Committee's power to swear him you must acquit the defendant.

Denied. A. H.

20. If the jury find that the defendant before he was sworn desired and attempted to make objection to the right of the Committee to question him under the circumstances which existed on February 6, 1946, you must acquit the defendant.

Denied. A. H.

399 21. The jury must acquit the defendant unless they are convinced beyond a reasonable doubt that he would have refused to testify under oath after having objected to his arrest, detention and transportation which believed to be unlawful and procured by the Committee.

Denied. A. H.

22. If you believe from the evidence that the defendant did not come voluntarily to the hearing before the Un-American Activities Committee on February 6, 1947, you must acquit the defendant.

Denied. A. H.

23. If you believe from the evidence that the defendant did not come to the hearing before the Un-American Activities Committee on February 6, 1947, under and in pursuance of the subpoena theretofore served upon him you must acquit the defendant.

Denied. A. H.

24. The fact that this defendant has been indicted is no evidence that he has committed the offense with which he is charged.

Granted. A. H.

25. The fact that the Government is the prosecutor and asks that a man be convicted is of no consequence. When the Government becomes a litigant in the Federal courts, its right is no greater than that of the most humble person in all the land.

400

Denied. A. H.

26. Each juror must be convinced in his own mind beyond a reasonable doubt of the defendant's guilt.

Denied. A. H.

27. No juror must be swayed if he has a reasonable doubt, by the mere fact that a majority of the jurors are convinced of the guilt of the defendant.

Denied. A. H.

28. If you find that under Committee procedure the defendant before being sworn had a right to object to being sworn and was attempting to make such objection when he was dismissed, you must acquit the defendant.

Denied. A. H.

29. It was the Committee procedure to allow a witness before being sworn to state any objection to being sworn. If you find that the defendant was attempting to state such objections before he would take the oath you must acquit the defendant.

Denied. A. H.

30. The fact that counsel for the defendant was present in the hearing room and remained silent did not prevent the witness from himself making objection to being sworn.

Denied. A. H.

Argument on Motions in Arrest of Judgment and for New Trial.

403 Mr. Rein: The motion to arrest judgment we would make first. We have two grounds for that motion. One is that the indictment does not state an offense against the United States. The second is that the statute and the resolution setting up the House Committee on Un-American Activities are unconstitutional. I believe Your Honor is familiar with the arguments in that matter, and unless you wish to hear further argument—

The Court: I do not think I would encumber counsel, because those points were argued before me in full, and I am going to adhere to my rulings. I will deny the motion.

Mr. Rein: Thank you, Your Honor.

On the motion for a new trial, we have a memorandum which I believe will assist Your Honor in following our oral argument on that motion.

404 The Court: Very well.

Mr. Rein: We wish to divide our argument on that motion, Your Honor, among counsel. Mrs. Carol King will proceed on the first point in the memorandum.

The Court: Very well.

Mrs. King: If Your Honor please, the defendant urges very strongly that an erroneous determination was made on his affidavit to disqualify the Court on the basis of bias and prejudice. The opinion of this Court on that question took up three matters.

In the first place, the Court said that the affidavit was not timely. On that issue we contend that the affidavit was timely; that the trial judge was not assigned, as far as defense counsel knew, until the 20th day of May; that on that day the defendant consulted with Abraham J. Isserman, who he knew was going to be his trial attorney, and it was arranged that Mr. Isserman would consult defense counsel in Washington on the 23rd of May; that on the 23rd day of May, due to the death of Mr. Isserman's brother, it was impossible for him to consult with counsel, and he became unavailable until May 27, and on that day there was a conference of defense attorneys, and on the following day

the affidavit of bias and prejudice was forwarded from New York to Washington on the 29th of May.

On the second point, the Court ruled that the affidavit was insufficient. Upon that issue, in view of the Court's
405 ruling that the affidavit in the Barsky case was similar, and in view of the Court of Appeals granting a mandamus in the Barsky case, we believe that this constitutes a ruling as to the sufficiency of the affidavit in the case at bar.

On the third question—that is, that the certificate attached to the affidavit was not made by counsel—was not signed by counsel of record, and, in fact, was signed by signed by myself, Carol King, it is our contention that this was signed by counsel of record; that on the 22nd of April I appeared in the District Court in the District of Columbia before Chief Justice Laws and at that time was admitted to practice for the purpose of this case and on that day filed a notice of appearance in this case; that Your Honor should take judicial notice of the records of this court; and that there has never been a ruling, as far as I know, that a person who is recognized for the purposes of a case is not counsel of record—and there certainly has not been one in connection with an application to disqualify for bias and prejudice.

Therefore, at this time, in view of the expense that would be involved in taking an appeal in this case, we ask that a new trial be granted on the ground that there was an improper disposition of the affidavit of bias and prejudice.

In the Barsky case, it is our understanding that there was a time when this Court ruled that it was unnecessary to sue out a mandamus, in view of the fact that the
406 matter could be reviewed on appeal. It is our contention that in view of the length of the trial and the fact that the defendant is not a man of great means, it works a hardship upon him, and it is unnecessary, as the Court of Appeals has virtually ruled on the affidavit of bias and prejudice; and on that ground we urge that a new trial be granted.

Mr. Isserman: If the Court please, our second contention in respect to the motion that a new trial should be granted is based on the fact that throughout the trial, and for whatever reason, a situation was created in which the trial court by its rulings indicated that it favored the Government and was prejudiced against the defendant. We are not saying in this motion that there was any intention on the part of the trial court in that respect; we do say that a study of the record discloses that there were a number of types of situations in which the action of the Court had the effect of prejudicing the case of the defendant before the jury.

We think there were examples of this kind of incident in the method of putting questions to the jurors and in rulings that counsel for the defendants could not object before a Government witness had completed his answer, though such conduct was permitted Government counsel and indulged in by the Court when defense witnesses were on the stand or when defense counsel was engaged in cross-examination.

We think, too, that the Court in reprimanding de-
407 fense counsel on a number of occasions, and, as we believe, without cause, and within the presence of the jury, created an atmosphere in which it was difficult, if not impossible, for the jury to consider the matter on the facts which were before it. We consider also from the record of the case that the Court, again without charging the Court with any motive, did obstruct defense counsel in the matter of presentation of matters to the Court and jury. We say also that the imposition of numerous objections to defense testimony, not raised by Government counsel, and undue cross-examination of the defendant by the Court, and permitting Government counsel to do so, contributed to the situation.

We say, too, that perhaps if each item is considered individually, not all of them in themselves would warrant the granting of a new trial; but we do say, in accordance with the principle laid down in some of the cases which are cited

in our memorandum, that the sum total of the incidents which occurred, whether or not each specific one was ground for reversal, created that atmosphere, which under the rules laid down in the Canons of Judicial Ethics and in the cases, prejudiced the defendant's case.

Of course, it is difficult to determine whether or not the jury was in fact prejudiced; but the courts hold it sufficient if the atmosphere which is created is one in which the jury might possibly have been prejudiced from a study of
408 the record as it appears.

Now, I say, too, that unfortunately in the colloquies between the Court and defense counsel there somehow or other crept in at the trial a display of feeling, as indicated by the actual remarks made back and forth and, if they were capable of reproduction, even by the tone of counsel and the Court.

Now, under the cases it is not even necessary to determine whether counsel was at fault, as the Court at times indicated, because of his apparent appearance of discourtesy, in the Court's view, or whether the Court, for whatever reason, was at fault in not preventing these colloquies and displays of feeling. But we say the fact that they existed, and we say that the numerous incidents indicated by the record show that they did exist, warrants that the defendant in this case, under the difficult circumstances of his relationships which were developed during the trial, and the difficult circumstances which exist in respect to the problem of a communist alien being tried in this period—we say that all of these matters considered together would require a trial in which every care was taken, in which no incident appeared with might possibly be considered as affecting the judgment of the jury.

I should like to spend a little time in going into the
409 types of incidents which we consider are the ones that the Court should now consider in this motion for a new trial.

The Court: I have been reading these excerpts. I have just finished reading them, so you do not have to discuss them in extenso.

Mr. Isserman: Well, I should like to do so; but if the Court suggests that I should not—

The Court: Well, you may if you wish; this is only a suggestion.

Mr. Isserman: Well, I should like to say this, Your Honor: We spent considerable time in studying the record, and we were careful in trying to select those incidents which we believed illustrated the points we would like to make. We do hope that the Court will give them the full consideration they deserve, because, as Mrs. King pointed out, it would be a needless expense, with needless time wasted by the Government and by Government counsel and defense counsel, if the defendant were put to the expense of an appeal when, for many reasons, a new trial would obviate many of the points which are now subject to appeal before the appellate court.

In going into all the incidents, I should like to discuss the problem which arose and which continued throughout the trial of the Court's rulings in respect to the questions put by counsel to witnesses. The Court made clear to defense counsel on a number of occasions, and quite emphatically, that a witness who was testifying—and this
410 was without regard to whether his answer was responsive—would be allowed to continue his answer without objection by defense counsel, and that defense counsel would have to wait until the witness finished, no matter how long his answer might be. This occurred particularly, and I believe for the first time, as this record shows, in the case of Congressman Parnell Thomas, when he was on the stand. I refer to the matter which starts on page 7 of our memorandum and goes on from there.

When in the course of that examination, as the Court will recall, Mr. Thomas, when asked for a specific answer on something to justify a statement he had made, started to

read the record. Counsel then desired to make the objection that the reading of this record, which was not in evidence, was improper, and the Court said:

"The Court will inform counsel again that in this court it is not the practice to note objections in the middle of a witness' answer."

At that point counsel had called the attention of Congressman Thomas to a statement that he had testified to the day before, which was that "Mr. Eisler replied that he would not testify." That is what Mr. Thomas said Mr. Eisler had said at the hearing before the committee.

Defense counsel then asked Mr. Thomas to point out in the transcript of the committee hearing where this stafement appeared. The witness, over objection and
411 protected by the Court's ruling, read at length from the transcript. Whether or not that would have been stricken, the fact is that this record, which later the Court excluded, was read to the jury by the witness while counsel was objecting, or without giving counsel an opportunity to object.

The Court: I recall that incident, and my final ruling was that in view of the nature of the question propounded by counsel, the answer was responsive.

Mr. Isserman: We know that the Court ruled that way; and we also point out that even before the witness had finished, the Court had said that the answer of the witness was entirely responsive. Then, when we made our motion to strike, that motion was denied.

The Court: That is just a question of whether there was an error of law in my ruling.

Mr. Isserman: It is true that it is a question of an error of law, which in itself, in our opinion, would warrant a new trial on the second aspect or point we are arguing at this time.

On the other hand, when the defendant was on the stand—and I might say this example of Mr. Thomas is one of several that we quote, where counsel was not allowed

to make what counsel believed was a timely objection when the defendant was on the stand, a different conduct was afforded. On one occasion Mr. Hitz said to the defendant:

412 "Did counsel advise you as to these rights?"

There was an answer by the defendant: "Yes, counsel advised me—"

And the record indicates he did not finish. Mr. Hitz said:

"I am sorry, you have answered the question."

The Court said:

"Just answer yes or no."

The question that was asked of Mr. Thomas on at least one occasion was designed to elicit exactly the same yes or no answer, as we show in our memorandum; but there the Court allowed Mr. Thomas to finish, even though the matter he gave was irrelevant. But in the case of the defendant, when he was testifying, this rule of allowing the witness to finish his answer did not work.

Not only was that done by Government counsel but also by the Court. For instance, I think this is fairly illustrative. Mr. Isserman asked a question as follows:

"Mr. Thomas has testified at this trial, Mr. Eisler, that after you were asked to take the stand you said, 'I am not going to take the stand,' and I ask you now whether you made that statement?"

The answer was: "Yes, it was the first part of the statement which I was not able to answer because I was interrupted."

413 Then I asked: "What is the second part?"

The Witness got as far as to say: "I wanted to say—" when the Court said:

"No, you have answered the question."

My question was: "What is the second part?"

The witness spoke a few words, "I wanted to say"; and the Court said, "No, you have answered the question."

Another time, in discussing the question of a Mexican passport, the witness said:

"Yes, I had a Mexican substitute passport, because I was invited—".

The Court said:

"Just a minute, you have answered the question. You need not go over these details because they are irrelevant. You have shown he was here on a transit visa to Mexico. That is enough."

Mr. Isserman said:

"I would like to proceed if I may."

The Court said: "Ask the next question."

Again, while this single incident may not by itself be a matter for reversal, it is part of a series of incidents which indicate the difference in treatment which was accorded, which was bound to be noticed by the jury, as it was by defense counsel, and which certainly would indicate to the jury that there was an atmosphere not of complete impartiality.

414 Now, much more significant is the fact that throughout the trial the Court in its remarks to defense counsel clearly, in our opinion, overstepped the bounds permitted by the Canons of Ethics and by the cases. As I pointed out, under the cases it is the effect of these remarks on the jury which is important.

The Court: Personal remarks to counsel, admonitions to counsel, were made at a bench conference. The Court called counsel to the bench and gave an admonition to counsel at a bench conference out of the hearing of the jury.

Mr. Isserman: That was true in one case; and in that case, if Your Honor will recall—and we refer to it here—the Court did say, as we point out, that if counsel was not careful—and there was a warning being given—the next time the rebuke might be made in the presence of the jury.

The Court: Because it seemed to the Court that counsel's manner was not that to which the Court was accustomed from other members of the bar.

Mr. Isserman: We are not now arguing, although our own summary of the record would indicate that for some

reason—and I am free to confess I do not know why—the Court seemed to have developed an animus toward defense counsel—

The Court: No, the Court has no animus toward defense counsel whatever. The Court wants to assure counsel that there is no animus toward counsel personally. But
415 the Court does exact courtesy and urbanity from all members of the bar. It is not a matter of feeling or animus at all. It seemed to the court that those bounds were transcended by counsel for the defendant. The Court was not sure whether the custom and usage in counsel's own jurisdiction was different and for that reason hesitated to call attention to the fact in open court and so called counsel to the bench.

Mr. Isserman: I should like to go back a minute to the bench conference that your Honor has alluded to. The point I should like to make is that while the Court did say at that bench conference that thereafter a rebuke might be made in the presence of the jury, we say the record shows that rebukes—not the particular rebuke, but other rebukes—were made before and after that particular bench conference and in the presence of the jury. We say that there is no circumstance, as far as we understand the cases, in which a defendant can be punished before the jury by rebuking his counsel in the jury's presence.

The Court: If counsel oversteps the bounds, I think the Court has a right to check counsel. It is unfortunate that the defendant suffers. But in this particular case the Court took care to explain to counsel at the bench conference the type of conduct and the type of manner that was expected.

Mr. Isserman: If the Court will remember, and as the record shows, defense counsel indicated his intention
416 to be urbane and courteous to the Court.

The Court: Oh, yes; there is no doubt about that. The Court has no feeling that counsel intended to be discourteous; but, after all, the Court can only judge by counsel's actions and cannot read the workings of his mind.

Mr. Isserman: Well, I agree with Your Honor that this was unprovoked; and our study of the record indicates there were a great many instances in which it would seem that counsel had not acted in a provocative manner to the Court.

The Court: Those matters do not appear in the record because, to some extent, they involved brusqueness of tone and matters of that kind.

You may proceed. I have read your memorandum.

Mr. Isserman: I should like to call Your Honor's attention to our viewpoint of it, which does seem to differ from the Court's.

The Court: I beg your pardon? I did not understand.

Mr. Isserman: I should like to refer to a few incidents which indicate the basis of our viewpoint.

The Court: I have read them. I suggest you make it brief.

Mr. Isserman: I will try to, if the Court please. In the early part of the record, pages 103-105, counsel was cross-examining the witness Stripling, and at one point the Court said:

417 "I think that is minutiae and is immaterial, because the charge against the defendant is that he declined to take the oath. What chair he was sitting in or whether he was seated or standing is, I think, immaterial. I suggest to counsel that the interrogation be directed to the charge in the indictment."

Counsel was about to say something when the Court said: "Do not argue. I made a suggestion. Proceed to the next question."

But the Court had not ruled out the previous question, and counsel was obliged to say:

"I would like to have an answer to the question I just put."

Then the reporter read the question, and the proceeding continued. The Court's frequent reference to minutiae and the Court's rebukes to defense counsel not to argue or to

stop anybody created the atmosphere of which we complain.

The Court: Well, I think that is in the realm of trivia.

Mr. Isserman: Now, another incident occurred which we think is typical. In one situation—record, 125—counsel asked that a remark made by Congressman Thomas be stricken as not being responsive.

The Court said:

"It may be stricken. Just state your motion; do not argue."

418 Counsel had not argued; counsel had merely stated the grounds. Only a few minutes after this took place, the following took place:

Counsel has asked: "Now, Mr. Thomas, you were reading from a transcript of the hearing, were you not?"

Mr. Thomas: "That is correct."

Mr. Isserman: "Have you read all the questions and answers which deal with Mr. Eisler's refusal to be sworn?"

Mr. Thomas answered:

"Up to that point. I shall be glad to continue."

Mr. Isserman said: "Just a moment; you will get an opportunity to continue."

The Court said: "Do not argue with the witness."

Counsel said: "Well, the witness was remonstrating with counsel. I asked that he be admonished to answer the question."

The Court said: "I suggest to counsel that he proceed as counsel should."

Then counsel said: "I wish to make objection to Your Honor's remark and ask that it be stricken."

The Court said: "Motion denied. Counsel's function on cross-examination of a witness is solely to ask questions and not to remonstrate with the witness. Now, proceed and ask the next question."

Then, I think, at one time the Court said counsel
419 ought to know how to make an offer of proof—a brief statement of that kind made in the presence of the jury. Under the cases, it is clear that the Court may not,

in rebuking counsel, in condemning counsel's action on behalf of his client, create a situation which we say was created in this case; that counsel was inept, that the Court was displeased with counsel, for it certainly had its effect on the jury; it could not be otherwise.

Then, there was a very long colloquy in a bench conference, that Your Honor talked about.

In another instance, the difficulty counsel had did not, we believe, stem from counsel's actions. Counsel was trying to identify a telegram sent to John F. McGohey by the Attorney General. Counsel had got as far as to say:

"May I have the telegram dated April 12, 1947, addressed to the Honorable John F. McGohey, United States District Attorney, U. S. Courthouse, New York, signed—"

The Court then interrupted. Counsel was about to state who signed the telegram. The Court said:

"Don't go into all those details."

Counsel said: "I want to identify the telegram."

The Court said: "Just identify it briefly."

Counsel said: "I am going to give the—"

What would have followed was the signature.

The Court said: "Don't tell me that, just identify it briefly."

420

Counsel said: "I am trying to do as Your Honor tells me."

The Court said: "The Court has the last word."

But counsel was still obliged to complete identification and said:

"I shall complete the identification by indicating that it is signed by Tom C. Clark, Attorney General."

The Court: Yes. It seemed to the Court that counsel in a number of cases in identifying documents was doing it in such a way as to disclose a part of its contents instead of just saying, "The telegram from so and so to so and so dated such and such a date." That was the impression it made upon the Court.

Mr. Isserman: The fact is that counsel did what was directed by the Court.

The Court: Proceed.

Mr. Isserman: Now, another example of the Court's impatience with counsel, which we believe was not soundly based on counsel's actions, occurred when counsel asked Mr. McInerney the question:

"Mr. McInerney, I now ask you whether or not defendant Gerhart Eisler from his arrival in the United States in June, 1941, applied for any change of status from his status as to being here on a transit visa, up to and including February 4, 1947?"

421 There was objection, and the objection was sustained.

Counsel then said: "I offer to prove that this witness, if allowed to answer, would state that the defendant Gerhart Eisler never applied for change in status."

The Court said: "Well, you mean you expect him to say no. That is the offer of proof."

Counsel said: "No."

The Court said: "Because your question calls for a yes or no answer."

At that time there was no conflict, and the Court insisted that the question called for a yes or no answer. Even now, when you read the question, it is clear that it did not.

Then, the Court said: "You ought to know how to make an offer of proof"—which was a rebuke in the presence of the jury.

Counsel then asked the reporter to repeat the question. The Court's remark then made was one that counsel had never heard before in the many jurisdictions in which he had tried cases: "The Court. You may do it this time but don't do it again. You ought to know your own question."

Invariably it has been the practice in courts in which I have appeared—in fact, it is counsel's right—to have the reporter repeat the question, because after colloquy no one can be expected to remember the exact question he

422 had put 3 minutes before.

Now, in the same colloquy the Court said:

"I still say the question calls for a yes or no answer. I think you are wasting time unnecessarily and I sustain the objection."

On that point there was no objection that was before the Court.

In the same colloquy, when counsel objected to the Court's remarks, the Court said:

"The Court never strikes its own remarks."

Well, that may be the practice, but, as we point out in our memorandum, the Cyclopedia of Federal Procedure says that when an error is called to the attention of the Court, it "ordinarily is cured by the act of the judge in withdrawing it and ordering it stricken out."

It is not only that counsel felt that there was a display of feeling between Court and counsel, which we believe was carried over to the jury; but also we believe the defendant's rights, as far as his counsel's right to cross-examine without interruption is concerned, was seriously curtailed by rulings of the Court. The Court seemed to be impatient. At page 118 of the record, the Court said.

"I do not want any time consumed on matters of stipulation."

Again, on page 119 of the record, the Court said:

423 "That question is excluded because that matter has been stipulated. Ask the next question."

The Court: Yes. The Court felt that after it had excluded certain types of evidence, there was an accumulation of offers of the same type of evidence when the defendant's rights were fully protected by a single offer and a ruling on that offer.

Mr. Isserman: I might say as to the point in question that counsel was cross-examining on quite another point.

The Court: You may proceed. Is there anything else on that point, Mr. Isserman?

Mr. Isserman: Yes, there are a number of things.

The Court: Well, as I said when this argument commenced, I have read all these excerpts that you have quoted. I have been reading them at the bench here.

Mr. Isserman: I should like to call attention to one or two more incidents here, without going into all of them.

The Court: I beg your pardon?

Mr. Isserman: I should like to call attention to one or two more incidents.

On page 18 of our memorandum reference is made to the situation in which the Government sought without proper foundation to introduce a copy of the transcript of the hearing of February 6. Defense counsel objected because the transcript contained irrelevant material and no
424 foundation had been laid for its introduction. The objection was essential to prevent irrelevant and possibly damaging material from reaching the jury. It was not made captiously. In sustaining the defense objection, the Court indicated to the jury that defense counsel was being technical and was obstructing the trial in that the transcript, if it were in evidence, "would be helpful." So the Court then excluded the evidence on an alleged technicality made by counsel and stated in the presence of the jury that this evidence if it had gone in would have been helpful; if evidence is excluded, it is not helpful and cannot be helpful.

The Court: The Court's view on that was this, Mr. Isserman: You had the witness Thomas read pertinent portions of the transcript. Then Mr. Hitz offered the transcript in evidence. It seemed to me that it was tweedledum and tweedledee whether the actual manuscript was in evidence, when in answer to your own questions pertinent portions of the transcript had been read.

Mr. Isserman: When the Court said in the presence of the jury in sustaining the objection that the objection "does not amount to anything," it would seem to me that that was a characterization of counsel's work and of the evidence, which was certainly prejudicial.

Now, with respect to bench conferences, the Court will remember that at one point the defendant had asked
425 that he be allowed to be present at bench confer-

ences. The Court ruled that he could not be, but that motions could be made from counsel table, except certain ones dealing with offers of proof. Then, at one point the following occurred, which indicated again an impatience on the part of the Court, remarks that seemed to indicate that counsel was to be punished in the presence of the jury. At one time after this colloquy at the bench the Court refused to allow defense counsel to make certain offers of proof.

The Court: I take the position that offers of proof are not necessary—and I so explained—to protect a party's right if the Court holds that the entire subject matter of the inquiry is irrelevant. It is necessary to make an offer of proof in order to preserve your rights only if the question of the admissibility depends on the nature of the answer. Then it is, of course, necessary to make an offer of proof. But I indicated several times that I deemed the defendant's rights to be sufficiently protected by asking the question. I ruled out the subject matter of the question as being irrelevant and that, therefore, an offer of proof was not necessary to protect the defendant's rights.

Mr. Isserman: I am not directing myself to the law in that respect. We concede that some of Your Honor's rulings on offers of proof were proper. But we are talking now of the treatment accorded counsel.

426 When the Court had refused counsel the opportunity to make an offer of proof from the courtroom, and when counsel then offered to approach the bench, the Court said:

"No; in the light of the statement made by defense counsel I will not allow that."

This was in the presence of the jury.

"You stated at the last bench conference that you preferred everything done in open court; that your client objected to having things done at the bench that he could not hear. I informed you that the only purpose of a bench conference is to protect the defendant. Now, you may not change back and forth."

Counsel answered: "I am not trying to change, if Your Honor please, but I believe an offer of proof is necessary in this case, and if we cannot make it in open court, we should like to make it at the bench, although I believe—"

And the Court said no, it could not be made either in open court or at the bench.

We believe this type of rebuke, along with the others, undoubtedly had its effect upon the jury when it considered the facts.

The Court: I think perhaps you have discussed that point sufficiently.

Mr. Isserman: We would ask the Court, in view of the Court's statement that the Court has heard enough
427 of the examples, to consider all of the examples.

The Court: Well, I have read them at the bench since this argument commenced. I may say that you and your associates have been speaking for about 35 minutes. That has been more than enough time for me to read this.

Mr. Isserman: I should like to say in conclusion that the sum total of the specific incidents which we have set forth indicates that the trial court in substantial manner violated the Canons of Judicial Ethics and the principles laid down by the cases governing the conduct of trial courts.

The Court: I suggest that you confine yourself to the law and not tell me that the Court violated judicial ethics. I think the Court is a better judge of that.

Mr. Isserman: We say that the Court on numerous occasions was discourteous to counsel and evidenced intemperance, impatience, and partiality. The Court intervened unduly in the examination and cross-examination of witnesses. We say that, according to the principles laid down in the cases, the Court was not "studious to avert controversy with counsel" but rather on occasion seemed to provoke such controversies. While the Court's manner or tone to counsel, aside from the actual language, can only be inferred from the state of the record, it is defense counsel's recollection that the Court's manner and tone on a substan-

tial number of occasions showed irritation, annoyance, displeasure, and hostility.

428 During the trial there was a substantial display of feeling between the trial court and defense counsel, sufficient, as indicated by the state of the record, to have influenced the jury adversely to the defendant.

The Court: I have read all this. You are just reading from a manuscript. I have read all of this.

Mr. Isserman: Well, we would like to say that when all these incidents are considered together, when the displays of feeling between Court and counsel are evaluated, in the light of the cases involving incidents of a lesser number and of less importance than we have outlined before Your Honor, in which there have been reversals of convictions because of the action by the trial court in departing from the principles of impartiality as laid down by the cases, we think, therefore, the Court should give serious considerations to these matters; and we feel certain that if they are, a new trial will be ordered on this ground alone.

Mr. Rein: We have other grounds, Your Honor.

The Court: Proceed.

Mr. Rein: The next ground which we wish to discuss at this time is the Court's interpretation of the word "wilful" and its rulings on that.

The Court: So far as the interpretation of the word "wilful" is concerned, I do not think I will hear any argument on that, because I have made that ruling in two

429 different cases: in the Fields case and in this one. The Fields case is now before the Court of Appeals. I have studied this question and have heard counsel in this case and in others. I think it would not be helpful to anyone to argue that question further.

Mr. Rein: I think that Your Honor in your rulings and in your instructions to the jury in this case went beyond the Fields case, and that even if the Fields case were sustained—

The Court: Confine yourself to that. In what respect did they go further than in the Fields case?

Mr. Rein: I think, Your Honor, even under your instructions to the jury, that in order to wilfully default under this statute, the default must be deliberate and intentional, that the jury still should have been permitted to find and to decide whether or not the desire of the defendant, or of a witness, to make a legal objection before a committee constituted that deliberate and intentional default, constituted that deliberate, intentional refusal to testify.

The Court: I will overrule that point because that, of course, was a question of fact. I held the entire question a matter of fact for the jury as to whether the refusal was deliberate. I did rule also that advice of counsel or misconception of one's legal rights is not a defense. In so doing, I followed the Sinclair case.

Mr. Rein: If your Honor please, it is not our con-
430 tention that the defendant was refusing to be sworn on advice of counsel, and I do not think the issue was permitted to go to the jury, Your Honor, because we asked for instructions that the jury could consider whether or not the defendant wished to make a legal objection and, as a matter of fact, that they consider that in determining whether or not the action of the defendant was wilful.

The Court: I ruled on that at the trial after consideration of the matter. I do not think any purpose would be served by hearing further argument on that point.

Mr. Rein: Very well. Not only did you not permit the jury to pass upon that question, but you stated to the jury in your charge, Your Honor, that the issue in the case was whether or not a witness could—and I quote from your charge at the time, Your Honor—"dictate the conditions under which he will or will not take the oath as a witness or the conditions on which he will or will not testify."

I submit, Your Honor—

The Court: I did not say that that was the issue.

Mr. Rein: You said that that was one of the issues.

The Court: Oh.

Mr. Rein: You refused to submit to the jury the issue as to whether or not he wished to make a legal objection,

in connection with wilfulness, thereby eliminating that issue, and thus characterizing the defendant's conduct
431 to the jury and leaving nothing for the jury to pass upon as a matter of fact.

The Court: I do not think I will hear anything further on the word "wilful."

You gentlemen have taken almost three-quarters of an hour on this motion for a new trial. That is longer than we ordinarily give to motions for new trials.

Mr. Rein: Commenting on the interpretation of the word "wilful," but in connection with the admission of evidence on the word "wilful," in permitting the Government to introduce evidence but excluding evidence when the defense wished to put it in, at a bench conference at the time of the opening statement of defense counsel your Honor stated that he would permit defense counsel in his opening statement to comment on what the witness wished to say before the House committee in that 3-minute statement. You at that time indicated that you thought the contents of that statement, insofar as it indicated legal objection, went to the issue of wilfulness.

Despite that statement at that time, and despite your permission to defense counsel to comment on that in his opening statement, when the question was asked on direct examination as to what it was he wished to say in that 3-minute statement, Your Honor sustained the objection and excluded that evidence.

432 The Court. No. I think, if my recollection is correct—I think you are in error—I permitted the witness to state what he wanted to say in a general way—that he wanted to interpose some legal objections to the committee's actions; or something to that effect. I did not, however, allow him to repeat the 3-minute statement. That is a different proposition.

Mr. Rein: Well, I should like to refer Your Honor to the record. We have the record citation in our memorandum. I think you will find that my statement of the evidence is correct.

I should like to go further, Your Honor, and point out that despite that, you permitted the prosecution on cross-examination to ask whether or not the defendant would have testified and would have answered the question after he had made a 3-minute statement, although you refused to permit the defense to examine and bring out that he would have answered the question. The prosecution was also permitted to argue to the jury on the basis of that examination that, in fact, he did not intend to answer questions.

The Court: What is the next point?

Mr. Rein: I should like also to point out in connection with this same evidence the defendant's willingness to make legal objection. Your Honor permitted counsel for the prosecution to put in evidence that the defendant had
433 counsel at the hearing, and to argue to the jury that it was the function of counsel to make legal objection before the committee, although you refused to permit the defendant to put in evidence to show that under the committee practice counsel is not permitted to make legal objections, so that if any legal objection was to be made before the committee, that legal objection would have had to be made by the witness and not by counsel.

In summary, I think that no issue of fact was presented to the jury, both by your rulings and by your instructions to the jury, and that Your Honor's charge to the jury was tantamount to a direction to find the defendant guilty.

I believe that certainly there was a sufficient issue of fact under any definition of wilfulness, Your Honor, to permit the jury to pass upon whether or not the defendant, because of his desire to make a legal objection, was not wilfully refusing to be sworn.

To go on to my next point, I believe the Court erred in excluding evidence which the defense wished to introduce to show that the committee in this case was acting improperly and beyond the scope of authority committed to it by the Congress.

The Court: I will not hear counsel on that at this time, because I passed on this matter on the motion to dismiss the indictment.

434 Mr. Rein. No, Your Honor.

The Court: You raised the committee's authority to—

Mr. Rein: This is another question, Your Honor.

The Court: What is the question?

Mr. Rein: The question here is not that the committee is not constitutional and does not have authority, but that the committee in this particular case acted beyond the authority committed to it by the Congress.

The Court: What was the evidence you claim should have been admitted?

Mr. Rein: The evidence and the offer of proof are in the record.

The Court: Tell me briefly what it is.

Mr. Rein: We offer to prove that the committee was not examining the defendant in order to elicit any information upon any matter of inquiry committed to it by Congress.

The Court: Oh, I recall now.

Mr. Rein: But rather to harass and punish the defendant for his political beliefs.

The Court: I will adhere to my ruling that the motives of the committee are immaterial and therefore evidence of the motives of the committee will not be admitted.

Mr. Rein: Your ruling in that respect is tantamount to a statement that the conduct of a Congressional committee is not subject to judicial review under any circumstances.

435 The Court: It is tantamount to that unless the committee exceeds its authority; but what the motives of the committee are is not for the scrutiny of the judicial branch of the Government.

Mr. Rein: If Your Honor please, we were trying to show that the committee exceeded its authority, not what its motives were, Your Honor. I believe Your Honor's ruling makes it impossible ever to present any evidence to challenge the authority of a Congressional committee.

The Court: Proceed to the next point.

Mr. Rein: The next point, I believe, has been discussed before with Your Honor, and I shall not go into it in any detail at this time. We believe that the Court erred in excluding evidence to show that the defendant, as an enemy alien, was not required to testify.

The Court: That is a question of law that I have ruled on. I will adhere to my ruling.

Mr. Rein: As an alien in transit, he could not be called before the committee to testify, and that because he had been unlawfully arrested and unlawfully brought before the committee he was under no obligation—

The Court: I considered these matters, and I have already ruled on them.

Mr. Rein: Our final point in the brief, which I believe has already been covered by our discussion—that this
436 case should not have gone to the jury to permit the jury to make a decision in this case—is that there was not sufficient evidence to go to the jury in any event. We base that on two grounds. One is that it was essentially a part of the Government's case to show that the defendant was summoned before the committee upon matters of inquiry—

The Court: I ruled that out because I felt that that would be relevant if the defendant had refused to answer specific questions, for then the relevancy of the questions would be proper.

Mr. Rein: And also that the only thing that the evidence shows is that the defendant wished to make a legal objection before the committee, that Representative Thomas, chairman of that committee, stated that a witness before a committee had a right to make a legal objection before being sworn, and that on that evidence no verdict of guilty can be sustained, Your Honor.

The Court: Mr. Hitz?

Mr. Hitz: Your Honor, the Government is of the opinion that the affidavit of prejudice was properly denied because it was filed too late and was not sufficient on its face. That

the conduct of the trial was not only proper but fair; that the jury was properly selected—that is the third point, that I do not believe, however, was covered here by defense counsel in argument. We do not believe there was
437 any error in the selection of the jury and the failure to disqualify Mr. Dean, who knew Mr. McInerney, for cause and for the other reasons that are mentioned here. The Government believes that the jury was properly selected.

The question of "wilful," I think, requires no reply by the Government. That has been adequately covered in the preliminary proceedings.

The evidence did seem to be sufficient to require submission of the case to the jury, and we think the jury's verdict should finally stand. We did not offer any evidence on the question of pertinency because that question never arose before the committee.

Mr. Eisler refused to be sworn, and therefore we think he did commit this contempt.

The Government has no reply to make to the other points that are argued here with respect to the details of the conduct of the trial. We think the record speaks for itself.

438 **Opinion of the Court**

The Court: The Court feels that the defendant had a fair trial. All of his rights under the Constitution and the laws were very sedulously accorded to him. Consequently, the Court feels that the assertion now made that the defendant did not have a fair trial or that the Court showed or exhibited prejudice against him or his counsel is not well founded. Otherwise, the motions for a new trial and in arrest of judgment do not present any new matter. Some additional observations appear appropriate, however, in regard to the contention that the judge should have disqualified himself because of the affidavit of bias and prejudice filed in behalf of the defendant.

In support of his argument, the defendant refers to the recent decision of the United States Court of Appeals for

the District of Columbia in Barsky v. Holtzoff, handed down June 14, 1947. That decision, however, is not a precedent for the situation presented here.

By memorandum filed by me on June 4, 1947, the affidavit of prejudice in this case was stricken on several grounds, among them that the affidavit was filed too late. The affidavit was not filed until May 29, 1947. Previously, on May 23, a motion to dismiss the indictment was argued before me on the merits and decided by me. Prior to this argument an application for a continuance of the trial was heard by me in chambers. Another application for a continu-
439 ance was informally heard and granted by me, subsequently to the argument of the motion to dismiss. It was only after the second continuance was granted that the affidavit of prejudice was filed.

The Barsky case is distinguishable because, as I am informed, counsel for the defendants in that case orally contended before the Court of Appeals that the affidavit in that case was filed in due time and that he sought to support his position by claiming that he did not know that the case was to come for trial before me until a few days before the affidavit was filed. The truth or falsity of this contention need not be here discussed. It was but natural, however, for the Court of Appeals to accept a statement of fact emphatically asserted by a member of the bar in open court.

The filing of an affidavit of bias and prejudice is a very serious and grave matter. For this reason the statute (U. S. Code, Title 28, Sec. 25) exacts a certificate made by counsel of record to the effect that the affidavit is filed in good faith and not for the purpose of hindrance and delay. The certificate of counsel attached to the affidavit in this case was executed by one Carol King, who is not a member of this bar, although David Rein, a member of the bar of this Court, was attorney of record. He did not sign the certificate. True, Carol King was admitted to practice by me solely for the purposes of this case. Nevertheless, a
440 lawyer who is not a member of the bar of this Court

does not bear the responsibility that is imposed on a member of this bar. For this reason it is my view that the certificate of counsel must be made by a member of this bar, who is an attorney of record. Consequently, in this case, the affidavit lacked a sufficient certificate and was stricken for this additional reason.

There are some decisions which held that in passing on the sufficiency of an affidavit of bias and prejudice, the affidavit may not be controverted, but must be dealt with as though it were true. Practice has shown this rule to be exceedingly dangerous, especially as such affidavits are permitted to be made on information and belief. To hold that no matter how fantastic or how false the assertions in the affidavit may be, they must be taken to be true, may lead to converting affidavits of bias and prejudice into dangerous instrumentalities in the hands of unscrupulous lawyers, for thwarting the ends of justice or delaying its administration.

The United States Court of Appeals for the District of Columbia recognized the danger of that doctrine in Hurd v. Letts, 80 Appeals D. C. 233. That case involved an action in equity to enforce a restrictive covenant in a deed to real property. An affidavit of prejudice was filed against the trial judge on the ground that the latter lived in a house with a similar covenant in its title. The judge quite properly declined to recuse himself, stating that he was
141 only a tenant by the month. The Court of Appeals, having before it the judge's supplementary statement concerning the allegations of the affidavit, held that the affidavit, taken together with the judge's statement, was insufficient to show bias and prejudice.

In the Barsky case, the Court of Appeals held that the trial judge may file an answer when an application is made to the Court of Appeals for a writ of mandamus to direct him to recuse himself.

At the conclusion of my memorandum of June 4, 1947, in which I disposed of the affidavit of prejudice in this case, I stated that, "I have no recollection of ever hearing of the

defendant in this case until I saw his name in the newspapers several months ago." I feel that in view of the rulings in Hurd v. Letts and in the Barsky case, it is appropriate for me to make the following additional supplementary statement.

The assertion contained in the affidavit that while I was connected with the Department of Justice as Special Assistant to the Attorney General, I was assigned to the Federal Bureau of Investigation, is untrue. Likewise, it is untrue that my duties were concerned with investigations by the Federal Bureau of Investigation into the activities of aliens and Communists. It is untrue that I advised the Director of the Federal Bureau of Investigation as to steps or actions to be taken against alien communists. It
442 is likewise untrue that I participated in advising, siding, or determining the policy, nature, scope or objectives of the investigation directed against aliens and Communists. As Special Assistant to the Attorney General of the United States my duties were numerous. On occasion I was requested to give informal opinions to the Federal Bureau of Investigation on questions of law. This aspect of my work, however, consumed but a very small part of my time and was sporadic. I did not participate in determining the policy or scope of investigations. Such matters were handled by other officers of the Department of Justice.

I may also observe that eminent justices, past and present, who prior to their appointment to the bench had been connected with the Department of Justice, have followed the sound practice of not disqualifying themselves in any matter that was pending in that Department when they were connected with it, unless the matter had come to their personal notice, or unless they had taken some action in regard to it. I have pursued the same practice.

The motions for a new trial and in arrest of judgment are denied.

* * * * * * * * * * *

Statement of Gerhart Eisler Before Imposition of Sentence

Mr. Eisler: Your Honor, permit me, sir, to state seven reasons why I should not be sentenced at all, neither to prison nor to a fine.

My first reason for this request is that I am the victim of a witch-hunting hysteria in this country, instigated and encouraged by the Un-American Activities Committee which abused the person of a German Communist, an
444 anti-fascist political refugee without a government, for its reactionary political aims. I do not think that law and justice in a democratic country should be influenced by such a hysteria as has happened, unfortunately, in my case.

My second reason is that I have already been—although innocent—very heavily punished by the authorities of the United States. I do not even count the ten weeks I was kept in prison for the illegal purpose of the Un-American Activities Committee, under the flimsy pretext of being a "dangerous enemy alien", but I count very heavily the fact that since May, 1945, I have been prevented from going back to my native land, despite all my numerous efforts. This is truly punishment enough for a man who has had to live for 13 years the bitter life of a political exile. The basic democratic right of a person to go back where he came from has been wantonly denied me. A prison sentence would continue this unjust and unreasonable punishment, and under still harder conditions of prison life.

The third reason for my request is the fact, disputed by nobody, that I am in the United States against my own will, and because of the extraordinary conditions created by the war. I beg of you to take into consideration that I was repeatedly prevented by the American authorities from going to a real and honest sanctuary for anti-fascist exiles, to Mexico. I repeat, a real and honest sanctuary and
445 not a trap and a waiting room for prison. Had I not been forced to stay in this country I would have been

back since the end of the war in my native land like so many other more fortunate European anti-Fascists, working there for the building of a peaceful, democratic, and progressive Germany. And I would never have been drawn into a conflict, a conflict which as a foreigner I did not seek, with the Un-American Activities Committee.

My fourth reason is the fact that all my activities during the war consisted in full support of the war effort of the United States and her Allies. Even my worst enemies and slanderers do not dare to doubt this.

My fifth reason is the fact that I am definitely not guilty of contempt of Congress. As a German Communist it is against my principles to feel or act contemptuously against other peoples and their democratic institutions. This, of course, does not mean that I am not full of contempt for the unlawful practices of the Un-American Activities Committee on the basis of my own experience. Such contempt, by the way, is expressed and shared by many and outstanding American citizens. The former Secretary of the Interior, Mr. Harold L. Ickes—

The Court: I will not hear the defendant denounce a committee of Congress. I will hear the defendant on the question of sentence.

446 Mr. Eisler: Your Honor, may I ask a question? I have three quotations. May I read—

The Court: I will not let you read quotations criticizing a committee of Congress. I think the matter of respect for a coordinate branch of the Government would not allow me to do so.

Mr. Eisler: My sixth reason is that my attitude at the hearing before the Un-American Activities Committee on February 6, 1947, was fully in accordance with the interests of the American people, upholding its democratic traditions, institutions, and laws. I did nothing else but demand three minutes freedom of speech in order to object against the cynical abuse of power by this committee, to state all my objections against my unlawful arrest and against my being brought unlawfully before this committee. By insisting

upon my right to object before I take the oath I refused to waive this basic democratic right and defend thereby also the democratic customs and laws of the United States.

And, finally, my seventh reason for asking Your Honor not to sentence me is the consideration of the international implications. To sentence in the United States a European anti-Fascist, who has fought his whole life against German militarism and imperialism, because he asked for three minutes to raise his objections against the abuse of power would unavoidably weaken the confidence of many
447 millions of non-Americans in American justice and the American way of life. Such a sentence could not but lower the prestige of the United States in the eyes of the innumerable progressive-minded and freedom-loving peoples in the world. I ask you, therefore, to prove by not sentencing me, that justice can be found in the United States for a European anti-Fascist despite the mad hysterial organized by the Un-American Activities Committee.

Should I, however, be sent to prison; should I, however, be forced to waste my time and money of the American taxpayers in an American prison instead of doing useful work in Germany, I shall go to prison with my head high. My conscience is clear, I have done what had to be done. I could not capitulate before reaction and waive my democratic and legal rights. I could not allow myself to be intimidated by those who have no respect for the Bill of Rights and are, to quote Henry A. Wallace, "a source of shame to decent Americans." I didn't want to behave differently than every decent American in my place would have behaved. I had enough and I had to object. And for this, Your Honor, I do not deserve to be sent to prison.

I thank you.

Mr. Isserman: I should like to enter an objection to the interruption by Your Honor of the defendant's statement.

The Court: Permission to make a statement is in
448 the discretion of the Court."

449 **Sentence of the Court**

The Court: In determining what sentence to impose in any case, this Court always takes into consideration a number of factors. Among them are the questions whether the defendant realizes the gravity and the importance of the offense he has committed; whether he has shown a repentant, contrite attitude; and whether he is willing to repair the damage that he has done, insofar as in him lies.

In this instance, the Court regrets to say that the defendant has shown an attitude of defiance; he is not contrite; and he does not appear willing to render any restoration or to cooperate with the Congressional committee which he has flaunted. He exhibited the same attitude throughout the trial.

During the trial, the defendant stated that he had a contemptuous feeling for the Congressional committee, and he has endeavored to repeat that in the statement which he has just attempted to make.

Although the Court had the authority to commit the defendant to jail after the jury found him guilty, and while he was awaiting sentence, nevertheless the Court in the exercise of its discretion permitted the defendant to remain on bail. Yet the defendant, not appreciating the discretion that was exercised in his favor, continued his openly defiant,

disrespectful attitude toward our Government. It is
456 apparent that this defendant does not respect the
institutions of this country. Under the circumstances, the Court feels there is no alternative except to impose the maximum sentence which the law provides.

Gerhart Eisler, it is the judgment of this Court that you be imprisoned in an institution to be designated by the Attorney General of the United States for a term of twelve months and that you be fined one thousand dollars.

452 **Defendant's Exhibit No. 1**

CONGRESS OF THE UNITED STATES
House of Representatives
Washington, D. C.

J. Parnell Thomas, 7th District N. J.
Chairman: Committee On Un-American Activities
Member: Committee on Armed Services
Home Address: Allendale, New Jersey
Office Address: 318 House Office Building

January 31, 1947

Honorable Tom C. Clark
Attorney General
Department of Justice
Washington, D. C.

Dear Mr. Attorney General:

On January 25, 1947, this Committee had a subpoena served upon *Gerhard Eisler*, of 48-46 47th Street, Woodside, Long Island, New York, requiring his appearance before the Committee on Un-American Activities, February 6, at the Committee's chambers in Washington, D. C. Eisler has been identified by witnesses before the Committee on Un-American Activities as being a representative of the Communist International.

The hearing which opens on February 6 will be of extreme importance, and it is necessary that Eisler be prohibited from departing from the United States or disappearing or refusing to appear. I have been reliably informed that he is endeavoring to take such steps. For this reason, I am requesting, as Chairman of the Committee on Un-American Activities, that you direct the agents of the FBI to put Eisler under an immediate twenty-four hour surveillance in order to insure his appearance before our Committee.

I am sure that your own files and records on this individual will justify my apprehension concerning this matter.

and your cooperation will be greatly appreciated by the Committee.

Sincerely yours,

J. Parnell Thomas

J. Parnell Thomas
Chairman
Committee on Un-American Activities

Defendant's Exhibit No. 2

453

Washington, D. C.
April 11, 1947

Honorable John F. X. McGohey
United States Attorney
U. S. Court House
New York, New York

PENDING A REVIEW OF THE ALIEN ENEMY HEARING BOARD'S DECISION, YOU ARE AUTHORIZED TO RELEASE GERHART EISLER AS OF 10:00 A.M. ON APRIL 15, 1947, FROM CUSTODY UNDER THE PRESIDENTIAL WARRANT ISSUED ON FEBRUARY 4, 1947 SO THAT HE MAY BE REMOVED TO THE DISTRICT OF COLUMBIA AND ARRAIGNED ON CRIMINAL CHARGES FILED AGAINST HIM IN THAT DISTRICT. THIS ACTION WILL RENDER MOOT THE QUESTIONS INVOLVED IN EISLER'S APPEAL FROM THE DECISION OF JUDGE FRANCIS C. CAFFEY.

Tom C. Clark
Attorney General

Indictment

454

Filed in open Court
Feb. 27, 1947

The Grand Jury Charges:

Pursuant to Public Law No. 601, Section 121, of the 79th Congress, (Ch. 753 2d Session), and House Resolution 5 of the House of Representatives of the United States, 80th Congress, dated January 3, 1947, the House of Representatives was empowered to and did create the Committee on

Un-American Activities, having duties and powers as set forth in said Public Law.

Gerhart Eisler, having been summoned as a witness by the authority of the House of Representatives, through its Committee on Un-American Activities, to give testimony before the said Committee at its session within the District of Columbia on February 6, 1947, upon matters of inquiry committed to said Committee by Public Law No. 601, Section 121, and aforesaid Resolution 5, did appear before the said Committee, on February 6, 1947, and was directed to be sworn to testify upon said matters, and the said Gerhart Eisler thereupon failed and refused so to be sworn to testify, and thereby on February 6, 1947, within the District of Columbia, willfully did make default.

GEORGE MORRIS FAY
Attorney of the United States in and for the District of Columbia.

A True Bill;
HELEN M. HOFFMAN
Foreman.

Plea

455 Tuesday, April 22, 1947

The Court resumes its session pursuant to adjournment: Hon. Bolitha J. Laws, presiding:

UNITED STATES vs GERHART EISLER

Criminal No. 21947

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Messrs. Carol King and David Rein; whereupon the defendant being arraigned upon the indictment, the reading whereof he specifically waives, pleads not guilty thereto, and for trial puts himself upon the country and the Attorney of the United States doth the like; and thereupon by consent of the United States Attor-

ney the defendant is granted leave within Twelve (12) days to withdraw said plea and demur to, or move to quash the said indictment, or otherwise plead as he may be advised.

458 Filed May 5 1947

Defendant's Motion to Dismiss Indictment

The defendant moves that the indictment be dismissed on the following grounds:

1. The indictment does not state facts sufficient to constitute an offense against the United States. The indictment shows on its face that the defendant appeared before the Committee on Un-American Activities, and fails to state and indeed rebuts any action by defendant which constituted a wilful default under the statute.

2. The defendant was not, at the time of the alleged default, a person subject to the statute or to the legislative jurisdiction to compel appearance and testimony before a Congressional committee. In support of this ground there is attached hereto and made a part hereof an affidavit of the defendant, marked Exhibit A, and a certified copy of the record on appeal in United States of America ex rel. Gerhart Eisler vs. District Director of Immigration and Naturalization of the Port of New York, United States Circuit Court of Appeals for the Second Circuit, No. 231, marked Exhibit B.

3. The statute and resolution creating the Committee on Un-American Activities of the House of Representatives and committing certain matters of inquiry thereto are invalid; and U. S. Code, title 2, section 192, cannot be constitutionally applied to punish the withholding of testimony from said Committee.

459 4. The proceedings herein were instituted not in aid of the legislative power to compel testimony, but for other purposes not within the legislative powers or the purview of the statute on which the indictment is founded or the authority of said Committee, as shown by

facts and circumstances of which the Court may take judicial notice.

Carol King
220 Broadway
New York 7, New York

David Rein
1105 K Street, N. W.
Washington, D. C.
Attorneys for Defendant.

Served:
W. Hitz
Assist. U. S. Atty.

May 5, 1947.

460 Filed May 5 - 47

Exhibit A.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

United States of America vs. Gerhart Eisler

Criminal No. 219-47

County of New York
State of New York, ss

Gerhart Eisler being duly sworn deposes and says:

(1) I am the defendant in United States of America v. Gerhart Eisler, Criminal No. 219-47.

(2) In 1939, shortly before the outbreak of the war, I was arrested in Paris with several thousand other anti-Fascist refugees, many of whom had fought on the loyalist side in Spain. We were beaten, starved, abused, and not a few of us were killed in French prisons and concentration camps. When the Nazi armies started to overrun France, the danger arose that we would be extradited to Hitler Germany in order to be tortured and killed.

The former president of Mexico, General Cardenas, sent to many of us, myself included, an invitation to come to **Mexico as a sanctuary.** The diplomatic representatives of Mexico in France intervened strongly in our behalf, as well as many decent Americans who demanded from Vichy the right for refugees of all creeds and political opinions to leave France.

Consequently, I and many others were sent from Vernet to another concentration camp near Marseille, in order to depart for Mexico. The Mexican Consul-General in Marseille, Mr. Bosquez, gave me and other refugees Mexican substitutes for a passport. No boat, however, left from Marseille directly for Mexico at that time and very few French boats sailed at all because the British had captured the boats of Vichy France. The French authorities did not want to grant us exit permits to leave for Mexico until we had obtained transit visas through the United States. This was because French boats went only to Martinique and from Martinique there was no direct transportation to Mexico. The route from Martinique to Mexico was *via the United States.* Since the French did not want us in Martinique, they wanted to make absolutely sure that we would leave for Mexico by the way of the United States.

461

At last, the American Consul-General in Marseille granted me and other refugees transit visas. But we were told we would not be allowed to go ashore in the United States, to which we agreed.

Finally, in the middle of May, 1941, I and many others left from Marseille with the French Boat, "Winnepeg", for Martinique. We were not very far from Martinique when our boat was captured by a Dutch cruiser and brought to Trinidad in the West Indies. We were again interned in a concentration camp, where we were carefully screened by the British military authorities.

But there were no boats from Trinidad to Mexico, either. We had to take an American boat for New York and change there for Mexico. I took such a boat with other

I arrived on the SS. "Evangeline", on June 13th, 1941, at the port of New York. I was brought to Ellis Island in a group of political refugees who were heading for Mexico. Those who were Yugoslavs, Hungarians, or Czechs were allowed to proceed on the next boat to Mexico. Those, like myself, who were Germans or Austrians had to remain in Ellis Island and were not permitted to go to Mexico. There existed an emergency law, directed against German Bundists and Italian Fascists, prohibiting their departure from the United States to any Latin-American
462 country during the war, to prevent their continuing in those countries their Fascist activities. This law did not make any distinction between Anti-Fascists and Fascists. As a result I was kept 2½ months at Ellis Island, together with other German anti-Fascists, until the American authorities decided what disposition to make of us. Finally I was released on $500.00 bail from Ellis Island in the status of a visitor, with the right to stay in this country for sixty days. During these sixty days I again asked for permission to leave for Mexico. This was again refused. I was kept here during the War as a refugee in the ordinary sense of that word.

On May 25, 1945, (immediately after the downfall of the Hitler regime) I applied, together with seventeen other anti-Nazi refugees, to the State Department for permission to return to Germany. That was refused. We repeated our request many times without success. We applied to all other embassies of the occupying powers unsuccessfully, until the Soviet government granted me and other German anti-Fascists a transit visa through Russia in order to proceed to Berlin or Leipzig where I lived and worked before Hitler came to power.

The State Department, on July 31, 1946, granted me an exit permit. *Before* it was granted the FBI questioned me for many hours. Unfortunately, because of strikes and irregular passenger service, it was not until October that I was able to get a place on a boat leaving October 18th, 1946. My baggage was already cleared and partially on

the boat, when on October 16th, I found out by accident that my exit permit was cancelled, without any reason
463 given.

I later learned that the reason for the cancellation of my exit permit was the issuance of a cock and bull story by Louis F. Budenz, who had resigned as Editor of the Daily Worker to take a job as Professor of Philosophy at Notre Dame. This story said that I was the "master mind" of the Communist Party, a representative of the Communist International, and other falsehoods.

As a result of these statements, I was subpoenaed to appear before the Wood-Rankin Committee on November 22, 1946. I duly appeared in Washington on that day and was told that I was not required at that time but would be notified when I was needed.

On the 24th day of January, 1947, I was phoned by an employee of the House Un-American Activities Committee who said he had a subpoena for me. I arranged to meet him to receive the subpoena, which called for my appearance before the Committee on February 6, 1947. My lawyer reserved a room at a hotel in Washington for that date, and on February 3, 1947, my wife bought railroad passage to Washington. My attorney went to Washington on February 4, 1947, to be present at that hearing. On the same day I was arrested as an enemy alien and was brought before the Committee on the 6th under arrest. I stated that I would testify and be sworn after I had made a three minute statement protesting the insinuation of the Chairman of the Un-American Activities Committee, Representative J. Parnell Thomas, that I would not appear unless arrested. This right was denied to me, and I remained silent.

GERHART EISLER

Sworn to before me this
29th day of April, 1947.
CAROL KING

464 Filed May 5 1947

Defendant's Motion for Bill of Particulars

The defendant moves the Court to direct the prosecution to file a bill of particulars setting forth in detail the specific matters concerning which the defendant was summoned to give testimony before the Committee on Un-American Activities of the House of Representatives.

CAROL KING
220 Broadway
New York 7, New York

DAVID REIN
1105 K Street N. W.
Washington 5, D. C.
Attorneys for Defendant.

Motions to Dismiss the Indictment and for Bill of Particulars Denied

465 Friday, May 23, 1947

The Court resumes its session pursuant to adjournment: Hon. Alexander Holtzoff, presiding:

UNITED STATES vs GERHART EISLER.

Criminal No. 219-47

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Carol King and David Rein; and thereupon the defendant's motion to dismiss the indictment and motion for a bill of particulars, coming on to be heard, after argument by the counsel, is by the Court denied without prejudice.

Affidavit of Prejudice

466 Filed May 29 1947

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK ss.

GERHART EISLER, being duly sworn, deposes and says:

1) I am the defendant in the above entitled cause;

2) I believe that the Honorable Alexander Holtzoff, Judge of the Court in which this action has commenced and is now pending, and before whom it is to be tried or heard, has personal bias and prejudice against me and in favor of the opposing party herein, and, further that the said Judge is concerned in and interested in said action and the reason for such belief is as follows:

a) I am an anti-fascist and was and still consider myself a member of the German communist movement. I was active for many years with the German underground in their struggle against Hitler and Nazism.

b) This cause is a prosecution for violation of Section 192 of Title 2 of the U. S. Code in which I am charged with willfully making default before the House Committee on Un-American Activities. I was called before this Committee because of the above activities and the lies and slanders about me in the testimony of Louis Francis Budenz and others before that Committee. At a hearing of the Un-American Activities Committee on February 6, 1947, out of which this very cause arose there was placed into the record a statement of J. Edgar
467 Hoover, director of the Federal Bureau of Investigation which was allegedly a report of an investigation of my activities by the Federal Bureau of Investigation over many years. Moreover, this report is set forth in full at pages 11-12 of the Committee hearings of February 6, 1947. This report indicates strong personal bias and prejudice against me. During the period of the investigation and until his elevation to the bench in September, 1945, Justice Holtzoff acted as

special assistant to the Attorney General assigned to the Federal Bureau of Investigation. His duties were concerned especially with the investigation by the F. B. I. into the activities of aliens and communists, into both of which catagories I fall. I believe that this investigation of my activities must have come to Justice Holtzoff's attention during the period while he performed such duties.

c) In a letter dated March 25, 1940, printed at A2466 of Vol. 87 of the Congressional Record, Justice (then Mr.) Holtzoff said:

"It so happens that for the past 15 years I have been, and am now, connected with the Department of Justice in a legal capacity. The Federal Bureau of Investigation, as you know, is a branch of that Department. I have had numerous official contacts with the Bureau, sometimes almost daily. In addition, Mr. J. Edgar Hoover is my close personal friend. Consequently I have had an excellent opportunity to observe the operations of the Federal Bureau of Investigation at close range from day to day." (See also Statement of the Assistant to the Attorney General, Hearings before the Senate Appropriations Committee, Sub-Committee on the 1941 Appropriation Bill of the State, Commerce and Justice Department, 76th Cong.

468 3rd Sess., p. 71)

d) In connection with his duties as United States attorney assigned to the F. B. I., Justice Holtzoff advised J. Edgar Hoover as to steps and actions to be taken against alien communists, such as myself. For instance, he sponsored and supported a bill permitting deportation of aliens and their being placed in concentration camps upon proof of membership in the Communist Party (see Hearings before Sub-Committee No. 2 of the Committee on the Judiciary, House of Representatives, 77th Cong., 1st Sess., H. R. 3). He appeared as representative of the F. B. I. on many occasions and defended that Bureau to the point where he was publicly

and responsibly charged with distorting the facts (87 Cong. Rec. A2470-1).

e) J. Edgar Hoover is and has been violently anti-Communist and, upon information and belief, has referred to Communists as "vermin" and "rats" and on occasion has referred to Communism as "red fascism", "a malignant growth" and "a virulent poison" (e. g. H. Rept. No. 2742, 79th Cong., 2d Sess., pp. 2-4). Justice Holtzoff not only sponsored activities, legislative and otherwise, which reflect these intemperate views of Mr. Hoover, and was associated with Mr. Hoover in such activities, but claimed that Mr. Hoover was "my close personal friend." He has publicly praised Mr. Hoover in most fulsome terms. (87 Cong. Rec. A2467) His close association with Mr. Hoover and the F. B. I. is reflected in his statement "I consider myself a competent witness concerning the activities of the Federal Bureau of Investigation, since I have watched them from day to day for a period of years." (op. cit. A2469)—Justice Holtzoff was legal advisor to the F. B. I. at the time the investigation of me was commenced and continued as such until September, 1945. Upon information and belief, he figured in an important capacity in advising and aiding and determining the policy, nature, scope and objectives of the investigation directed
469 against aliens and communists; which necessarily included myself.

In letters dated April 2 and 11, 1940, Justice Holtzoff defended the propriety of a compilation by the Federal Bureau of Investigation of intelligence concerning persons who were not criminals and who were neither charged with nor suspected of violations of law, but whose political views and opinions differed from those deemed to be proper by the Federal Bureau of Investigation (op. cit. A2469), clearly including those believed to be communists.

f) Among the issues involved in this case is the question of the right of the Un-American Activities Committee to

question me and others about political and other matters which are un American" as determined by the prejudices of the members of the Committee, the scope of authority vested in the Committee, its constitutionality, etc. The views expressed by Justice Holtzoff and his activities, while assigned by the Department of Justice to the F. B. I., indicate, in my opinion, that Justice Holtzoff is biased and prejudiced against me and in favor of the prosecution in this case and is incapable of giving me a fair trial; all of which serves to disqualify him.

g) I was first advised on or about May 20, 1947 by my counsel, who had just learned of the fact, that this case was to be tried before Justice Holtzoff. At that time I asked one of my counsel, Abraham J. Isserman, whether I was obliged to go on trial before a judge who had been connected with the F. B. I. and J. Edgar Hoover. He suggested that he would discuss it with my other counsel in Washington, D. D. on May 23rd. I was subsequently advised that no conference on this question was held on that day because of the sudden death of Mr. Isserman's brother. Mr. Isserman was unavailable because of this bereavement, until May
470 27th, on which day my counsel conferred. They reported to me on May 28th after which I directed them to prepare this affidavit.

GERHART EISLER

Sworn to before me this 28th day of May, 1947.

JACOB S. FUCHS

Jacob S. Fuchs
Notary Public, in the State of New York Resident of Bronx Co. at time of Appointment Bronx Co. Clk's No. 57, Reg. No. 84-F-9 Cert. filed in N. Y. Co. Clk's No. 595, Reg. No. 312-F-9 Commission Expires March 30, 1949

CERTIFICATION OF COUNSEL.

I hereby certify that I as counsel of record in the above entitled case, and as such prepared the above affidavit at the request of the plaintiff; that I am informed as to the proceedings therein and that such application and affidavit are made in good faith and not for the purpose of hindrance or delay. The reason for the failure to file the above affidavit not less than ten days before the beginning of the term of the Court is that the Honorable Alexander Holtzoff was not designated to try or hear this case until on or about May 20, 1947.

CAROL KING
Attorney for the Defendant

Dated: 28th day of May, 1947

471 Filed Jun 16 1947

Motion for New Trial

The defendant moves the Court to grant him a new trial for the following reasons:

1. The Court erred in refusing to disqualify himself following the defendant's filing before trial of the affidavit of personal bias and prejudice.

2. The defendant was substantially prejudiced and deprived of a fair trial in that the Court's demeanor, conduct of trial, and treatment of the defendant and the defendant's counsel indicated to the jury that the Court was prejudiced and biased against and hostile to the defendant.

3. The Court erred in denying defendant's motion for judgment of acquittal made at the conclusion of the evidence.

4. The verdict is contrary to the weight of the evidence.

5. The verdict is not supported by substantial evidence.

6. The Court erred in charging the jury and in refusing to charge the jury as requested.

7. The Court erred in denying defendant's motion to dismiss the indictment.

8. The Court erred in admitting testimony of the witnesses John Parnell Thomas and Gerhart Eisler to which objections were made.

472 9. The Court erred in sustaining objections to, and in excluding on its own motion, questions addressed to the witnesses John Parnell Thomas, Arthur J. Brosnan, Steve Greenman, Reginald Parker, James M. McInerney, Robert E. Stripling, Charles M. Rothstein, Gerhart Eisler, and Carol King, and in excluding proffered testimony of said witnesses.

10. The Court erred in denying defendant's motions to strike testimony of the witness John Parnell Thomas.

11. The Court erred in excluding proffered exhibits, marked Defendant's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10 for Identification.

12. The Court erred in questioning the jury panel and in refusing to question the jury panel as requested.

13. The Court erred in denying the motion to excuse for cause or favor Frank Dean, called as a juror.

14. The Court erred in refusing to make inquiries of the jury as requested.

15. The Court erred in the restrictions it placed on the defense's opening statement to the jury.

16. The Court erred in refusing to take, on request of counsel, judicial notice of official proceedings in the United States House of Representatives.

17. The Court erred in refusing to allow defendant to make offers of proof when requested.

18. The Court erred in refusing to allow defendant to make objections to the Court's instructions out of the hearing of the jury.

ANDREW J. ISSERMAN
A. J. Isserman
National Press Building
Washington, D. C.
CAROL KING
Carol King
220 Broadway
New York, New York
DAVID REIN
David Rein
1105 K Street, N. W.
Washington, D. C.

473 Filed Jun 16 1947

Motion in Arrest of Judgment

The defendant moves the court to arrest the judgment for the reason that the indictment does not state facts sufficient to constitute an offense against the United States.

ANDREW J. ISSERMAN
A. J. Isserman
National Press Building
Washington, D. C.
CAROL KING
Carol King
220 Broadway
New York, New York
David Rein
David Rein
1105 K Street, N. W.
Washington, D. C.

Defendant's Motion in Arrest of Judgment and Motion for New Trial Denied

474 Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Carol King, David Rein and A. J. Isserman; and thereupon the defendant's motion in arrest of judgment and motion for a new trial, coming on to be heard, after argument by the counsel, is by the Court denied.

* * * * * * * * * * *

Judgment and Sentence

Come as well the Attorney of the United States, as the defendant in proper person, according to his recognizance, and by his attorneys, Carol King, David Rein and A. J. Isserman; and thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him and he says nothing except as he has already said; whereupon it is considered by the Court that, for his said offense, the said defendant be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period on One (1) year, and to pay a fine of One Thousand ($1,000.00) Dollars; and thereupon the Court fixed the amount of bond in this case at Twenty-Thousand ($20,000.00) Dollars pending appeal.

* * * * * * * * * * *

Excerpt from Stipulation

477 III. Facts Stipulated.

It is stipulated and agreed that on about April 22, 1947, immediately prior to defendant's arraignment in the District Court, Carol King was admitted by Chief Justice Laws to the bar of the District Court of the District of Columbia for the purposes of this case, that on the same day she entered her appearance of record in writing as counsel for the defendant, and that she is and was at all times from and

after the arraignment of the defendant a counsel of record for the defendant in said case.

DAVID REIN
Counsel for defendant.

WILLIAM HITZ
Assistant U. S. Attorney for the District of Columbia

Docket Entries

479 219-47 CRIMINAL DOCKET

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

PARTIES UNITED STATES vs. GERHART EISLER

ATTORNEYS U. S. ATTORNEY CAROL KING & DAVID REIN
G. J. No. Orig.
Criminal No. 219-47 Charge: Vio. Sec. 192, Title 2, U. S. Code
Bond: $20,000.00 Treasury bonds, George Marshall

Date	Proceedings
1947 Feb 27	Presentment and Indictment filed
27	Bench Warrant Ordered & issued. (M142)
Apr 17	Bench Warrant returned, "Cepi". (Defendant on bond). (M 142)
22	Arraigned, Plea not Guilty, 12, days, etc. (M. 142)
22	Appearance of Carol King and David Rein entered.
21	United States Treasury bonds in the amount of $20,000.00 taken with George Marshall, surety filed in case 219-47 and Case 376-47. filed.
May 5	Defendant's Motion to Dismiss Indictment, filed, & affidavit in support thereof. Memorandum in Support of Defendant's motion

to Dismiss the Indictment, filed. Defendant's Motion For Bill of Particulars, filed.

9 Supplementary Memorandum in Support of Defendant's motion to Dismiss indictment, filed.

19 Government's Memorandum in Opposition to Motion to Dismiss, filed.

23 Motion to dismiss and Motion for Bill of Particulars argued and denied without prejudice (M 143)

29 Affidavit of Bias and Prejudice against Justice Alexander Holtzoff, filed.

Jun 3 Transcript of proceedings dated May 23, 1947, filed.

4 Motion for continuance argued and denied (M 143)

4 Memorandum opinion filed striking defendant's affidavit of prejudice.

4 Jury sworn; Respited until tomorrow (M 143)

5 Trial resumed, same jury; Respited until Monday, June 9, 1947 (M 143)

1947 Jun 5 Certified record of Official Reporter, Volume 1, pages 1-111, filed.

6 Transcript of proceedings, pages 112-241 filed.

9 Trial resumed, same jury; Respited until tomorrow (M 143)

10 Trial resumed, same jury; Verdict Guilty as indicted.

Defendant permitted to remain on bond pending sentence (M 143)

10 Transcript of proceedings, pages 242-317 filed.

11 Certified record of Official Reporter, Volume 4, pages 318-393 filed.

13 Certified record of Official Reporter, Volume 5, pages 394-401 filed.

16 Motion in Arrest of Judgment and Points & Authorities in support of Motion in Arrest of Judgment, filed.

16 Motion for New Trial & Points & Authorities in support of Motion for New Trial filed.

27 Defendant's motion in arrest of judgment and Motion for New Trial argued and denied. Memorandum filed. (M 143)

27 Sentenced to imprisonment for a period of One (1) year and to pay a fine of One Thousand ($1,000.00) Dollars. (JUDGMENT SIGNED) (HOLTZOFF, J.) (M 143)

27 Bond pending appeal fixed at $20,000.00 (M 143)

27 Memorandum in Support of Motion for a New Trial filed.

27 Recognizance $20,000.00 taken with U. S. Treasury bonds deposited 4/21/47 by George Marshall, surety, pending appeal.

27 Notice of Appeal filed (M 143)

Jul 2 Designation of record and stipulation filed.

11 Sentence of the Court pages 48-50 filed.
Certified record of Official Reporter, Volume 1, pages 1-50 filed.

Aug 1 Order extending time for filing record and docketing proceeding on appeal to October 6, 1947 filed (See Order) (Morris, J.) (M. 142)

1 Motion to extend time for filing record and docketing proceeding on appeal filed.

Sept 26 Defendant's corrected designation of record, filed. Photostatic copies of Defendant's Exhibits #1 & #2, filed.

United States Court of Appeals

DISTRICT OF COLUMBIA

No. 9582

GERHART EISLER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued April 5, 1948 Decided June 14, 1948

Messrs. David Rein and Abraham J. Isserman, with whom *Mr. Joseph Forer* was on the brief, for appellant.

Mr. William Hitz, Assistant United States Attorney, with whom *Mr. George Morris Fay*, United States Attorney, was on the brief, for appellee. *Mr. Sidney Sachs*, Assistant United States Attorney, also entered an appearance for appellee.

Mr. Belford V. Lawson, Jr., filed a brief on behalf of the National Lawyers Guild as *amicus curiae*, urging reversal.

Before CLARK, PRETTYMAN, and PROCTOR, JJ.

CLARK, *J.*: Appellant is an Austrian national who arrived in this country in 1941 as a political refugee, by virtue of a transit visa. On January 24, 1947, appellant was yet a temporary resident in this country and was on that date summoned by authority of the House of Representatives, through its Committee on Un-American Activities,[1] to appear as a witness before that Committee on February 6, 1947. On January 31, 1947, the Chairman of the Committee wrote a letter to the Attorney General of the United States informing the latter that a subpoena had been served on appellant and requesting assistance in the following manner: "The hearing which opens on February 6 will be of extreme importance, and it is necessary that Eisler be prohibited from departing from the United States or disappearing or refusing to appear. I have been reliably informed that he is endeavoring to take such steps. For this reason, I am requesting, as Chairman of the Committee on Un-American Activities, that you direct the agents of the FBI to put Eisler under an immediate twenty-four surveillance in order to insure his appearance before our Committee."

Subsequently, on February 4, 1947, appellant was arrested by two security officers of the Immigration and Naturalization Service, De-

[1] Hereinafter referred to as the Committee.

partment of Justice. On February 6, 1947, appellant appeared before the Committee in the custody of the security officers, accompanied by his legal counsel. When he was called as a witness the following colloquy ensued:[2]

The Chairman.[3] Now, Mr. Stripling, call your first witness.
Mr. Stripling. Mr. Gerhart Eisler, take the stand.
Mr. Eisler. I am not going to take the stand.
Mr. Stripling. Do you have counsel with you?
Mr. Eisler. Yes.
Mr. Stripling. I suggest that the witness be permitted counsel.
The Chairman. Mr. Eisler, will you raise your right hand?
Mr. Eisler. No. Before I take the oath—
Mr. Stripling. Mr. Chairman—
Mr. Eisler. I have the floor now.
Mr. Stripling. I think, Mr. Chairman, you should make your preliminary remarks at this time, before Mr. Eisler makes any statement.
Mr. Chairman. Sit down, Mr. Eisler. Now, Mr. Eisler, you will be sworn in. Raise your right hand.
Mr. Eisler. No.
The Chairman. Mr. Eisler, in the first place, you want to remember that you are a guest of this Nation.
Mr. Eisler. I am not treated as a guest.
The Chairman. This committee—
Mr. Eisler. I am a political prisoner in the United States.
The Chairman. Just a minute. Will you please be sworn in?
Mr. Eisler. You will not swear me in before you hear a few remarks.
The Chairman. No; there will be no remarks.
Mr. Eisler. Then there will be no hearing with me.
The Chairman. You refuse to be sworn in? Do you refuse to be sworn in, Mr. Eisler?
Mr. Eisler. I am ready to answer all questions, to tell my side.
The Chairman. That is not the question. Do you refuse to be sworn in? All Right.
Mr. Eisler. I am ready to answer all questions.
The Chairman. Mr. Stripling, call the next witness. The committee will come to order, please. What is the pleasure of the committee?
Mr. Stripling. Mr. Chairman, I think that the witness should be silent, or take the stand or be removed from the room, one or the other, until this matter is determined.
Mr. Mundt. Mr. Chairman, suppose you ask him again whether he refuses to be sworn.
Mr. Rankin. Not "sworn in," but to be sworn.
The Chairman. Mr. Eisler, do you refuse, again, to be sworn?
Mr. Eisler. I have never refused to be sworn in. I came here

[2] According to the official transcript of the proceedings before the Committee, read into the record at the trial of this case.

[3] The Chairman of the Committee, who was presiding, was Representative J. Parnell Thomas. Mr. Stripling was the Committee's chief investigator. Mr. Mundt and Mr. Rankin were members of the Committee.

as a political prisoner. I want to make a few remarks, only 3 minutes, before I be sworn in, and answer your questions, and make my statement. Is it 3 minutes.

The Chairman. I said that I would permit you to make your statement when the committee was through asking questions. After the committee is through asking questions, and your remarks are pertinent to the investigation, why it will be agreeable to the committee. But first you have to be sworn.

Mr. Eisler. That is where you are mistaken. I have to do nothing. A political prisoner has to do nothing.

The Chairman. Then you refuse to be sworn.

Mr. Eisler. I do not refuse to be sworn. I want only 3 minutes. Three minutes to make a statement.

Mr. Chairman. We will give you those 3 minutes when you are sworn.

Mr. Eisler. I want to speak before I am sworn.

The Committee then voted to cite Mr. Eisler for contempt. Thereafter, on February 27, 1947, an indictment was returned by the Grand Jury for the District of Columbia charging appellant with a violation of 52 Stat. 942 (1938), 2 U. S. C. § 192 (1946).[4] Appellant was tried before a jury in the District Court of the United States for the District of Columbia and found guilty; he has appealed from the judgment of conviction.

At the outset we are confronted with the contention made by appellant that the trial judge erred in refusing to disqualify himself following the filing of appellant's affidavit of bias and prejudice. The Justice designated to preside at the trial of this case struck the affidavit, principally on the grounds that it was filed too late and that it was legally insufficient.

The statute[5] which allows the filing of such an affidavit requires that "Every such affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term of the court, or good cause shall be shown for the failure to file it within such time." This case was originally set for trial on May 26, 1947. Several days prior to that date counsel for appellant requested a continuance of the argument on preliminary motions and of the trial. The Justice who had been designated to preside at the trial denied the continuance of the motions but granted continuance of the trial to May 27. Then, on May 23, the motions were argued and disposed of, and counsel for appellant requested a further continuance of the trial date because of the death of a brother of the chief trial attorney for the defense, which had occurred that day. The request was granted and the trial continued to June 4. We deem it necessary to set out these happen-

[4] The statute reads as follows: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[5] 36 STAT. 1090 (1911), 28 U. S. C. § 25 (1946). (Judicial Code, § 21.)

ings with chronological references, for the affidavit of bias and prejudice was not filed by appellant until May 29. As has been noted, this was after two continuances had been granted by the Justice against whom the affidavit was directed; it was three days after the first trial date had passed, and only six days prior to the date when the trial actually began.[6]

Appellant contends he had no knowledge of the identity of the trial Justice prior to May 20, although in the usual course of affairs he should have received notice of the designation earlier than that time. Nevertheless, the delay then ensuing before the affidavit was filed is attributed to the death of a brother of the chief defense counsel and the asserted consequence that the latter was prevented from giving his immediate attention to the matter. The explanation is reasonable so far as it goes, but appellant had two other counsel of record, one of whom actually certified the affidavit submitted, and it is not shown that it was essential to delay the affidavit for the reason given. This court has demonstrated willingness to apply the statute with liberality, with respect to the time element, where good cause was shown for delay in filing the affidavit, but we are not moved in this case to do so. See *Hurd v. Letts*, 80 U. S. App. D. C. 233, 152 F. 2d 121 (1945).

We are of the opinion that the lower court properly determined, as the second ground for striking the affidavit, that it was legally insufficient to show personal bias or prejudice regarding the justiciable matter pending before the court. The Supreme Court has ruled that the judge has a lawful right to pass on the legal sufficiency of the affidavit, *Berger v. United States*, 255 U. S. 22 (1921), subject to appellate review, of course, and we consider it the duty of the judge, when the showing for recusation is insufficient, to remain in the case.

The basis for disqualification upon affidavit is that the judge has personal bias or prejudice either against the affiant or in favor of an opposite party, by reason of which the judge is unable to impartially exercise his functions in the particular case. *Ex Parte American Steel Barrel Co.*, 230 U. S. 35 (1913). This court said, in *Hurd* v. *Letts, supra*:

> "Nothing is now better established than the rule that a sufficient affidavit under the statute must state facts and reasons which tend to show personal bias and prejudice *regarding the justiciable matter pending* and must give support to the charge of a bent of mind that may prevent or impede impartiality of judgment. Berger v. United States, 255 U. S. 22, 33, 41 S. Ct. 230, 65 L. Ed. 481.
>
> "Accordingly, the question in all such cases is whether the affidavit asserts facts from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge. * * *"[7] (Italics supplied.)

In the affidavit filed in this case, appellant identifies himself as a "German Communist" and then attempts to show bias and prejudice on the part of the Justice assigned to conduct his trial by reflecting on the latter's background as a Special Assistant to the Attorney

[6] See *Refior v. Lansing Drop Forge Co.*, 124 F. 2d 440 (C. C. A. 6th, 1942).

[7] 80 U. S. App. D. C. 233, 234, 152 F. 2d 121, 122.

General of the United States. Appellant alleged, upon information and belief, that the judge had, in that prior capacity, directly assisted Federal Bureau of Investigation inquiries into the activities of aliens and Communists, including appellant. It was further alleged that the judge was a close personal friend of the Director of the FBI, whom appellant characterizes as "violently anti-Communist." The affidavit also contained an assertion that the judge had, in connection with his previous duties, sponsored legislation providing for the deportation of alien Communists. Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the personal sense contemplated by the statute, assuming truth in all the facts stated. Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute. *Hurd* v. *Letts, supra; Price* v. *Johnston*, 125 F. 2d 806 (C. C. A. 9th 1942), *cert. denied*, 316 U. S. 677 (1942); *Simmons* v. *United States*, 89 F. 2d 591 (C. C. A. 5th 1937), *cert. denied*, 302 U. S. 700 (1937); *Craven* v. *United States*, 22 F. 2d 605 (C. C. A. 1st 1927), *cert. denied*, 276 U. S. 627 (1928); *United States* v. *16,000 Acres of Land, More or Less, in LaBette County, Kansas*, 49 F. Supp. 645 (D. Kan. 1942).

The affidavit serves as a starting point for an effort to becloud the real issue in the case. Despite the fact that appellant was on trial for contempt of a Congressional investigating committee, and not for his political beliefs, the record shows repeated attempts by defense counsel to raise appellant's self-styled status as a "political refugee" and "German Communist" to a level of decisive importance in the case. During the course of the trial defense counsel sought to introduce evidence to show that the Committee's real purpose in summoning appellant was "to harass and punish him for his political beliefs . . . and that the Committee acted for ulterior motives not within the scope of its or Congress' powers." The lower court properly refused to admit such evidence, on the ground that the court had no authority to scrutinize the *motives* of Congress or one of its committees. It is beyond question, as the result of venerable Supreme Court decisions, that either House of Congress has power to issue process to compel private individuals to appear and give testimony, in aid of the legislative function. *McGrain* v. *Daugherty*, 273 U. S. 135 (1927); *Sinclair* v. *United States*, 279 U. S. 263 (1929).

Appellant was summoned to appear before the Committee in the same manner that many citizens of the United States had been previously summoned. The fact that he was arrested and escorted to the Committee hearing by federal officers did not mitigate his obligation to give testimony; the arrest, if actually unlawful as appellant contended, was a matter to be contested by appellant in a judicial proceeding, if he so desired, and was irrelevant to the proceedings before the Committee. The arrest was accomplished under Presidential warrant—the power of the Executive to order the arrest was subject to scrutiny by the Judiciary, which stood ready to guarantee due process of law had appellant desired to properly invoke judicial determination of that question. Consequently the repeated attempts by defense counsel to elicit testimony regarding the arrest were defeated, and properly so, in the trial court, for such evidence was immaterial to the issues in this case.

Although he is an alien, appellant stood before the Committee in much the same position as does any citizen of the United States. Once an alien lawfully enters and resides in this country he becomes invested with the rights, except those incidental to citizenship, guaranteed by the Constitution to all people within our borders. See Mr. Justice Murphy, concurring, *Bridges* v. *Wixon*, 326 U. S. 135, 161 (1945). Correlatively, an alien resident owes a temporary allegiance to the Government of the United States, and he assumes duties and obligations which do not differ materially from those of native-born or naturalized citizens; he is bound to obey all the laws of the country, not immediately relating to citizenship, and is equally amenable with citizens for any infraction of those laws. *Carlisle* v. *United States*, 16 Wall. 147 (U. S. 1872); *Leonhard* v. *Eley*, 151 F. 2d 409 (C. C. A. 10th 1945), and cases cited therein. The alien resident may be required to make contribution to the support of our Government; in *Leonhard* v. *Eley*, *supra*, and in *United States* v. *Lamothe*, 152 F. 2d 340 (C. C. A. 2d 1945), it was held that an alien may lawfully be inducted for national defense service in time of war. To continue exemplification of the general lack of discrimination against aliens, it has been held that an alien enemy under criminal prosecution in a United States civil court must be afforded the usual constitutional safeguards. *Shinyu Noro* v. *United States*, 148 F. 2d 696 (C. C. A. 5th 1945).

It follows, then, that appellant's lack of citizenship did not raise a bar to his being summoned by a Congressional investigating committee for aid in securing its purpose. We need not review here the question whether the inquiries pursued by this Committee are constitutionally lawful, which is raised by appellant, for this court and the Second Circuit Court of Appeals have recently examined the question at length and answered affirmatively. *Barsky* v. *United States*, 82 U. S. App. D. C. ——, 167 F. 2d 241 (1948); *Josephson* v. *United States*, 165 F. 2d 92 (C. C. A. 2d 1947), *cert. denied*, 333 U. S. —— (1948).

Having been summoned by lawful authority, appellant was bound to conform to the procedure of the Committee. *Townsend* v. *United States*, 68 App. D. C. 223, 95 F. 2d 352 (1938), *cert. denied*, 303 U. S. 664 (1938). It was established at the trial of this case by the testimony of the Chairman of the Committee that it was customary procedure to allow witnesses to state legal objections to the jurisdiction of the Committee before they were required to be sworn. Appellant attempted to argue that such was his purpose in seeking leave to "make a few remarks" before he was sworn. The record shows an outright refusal by appellant, when he was first called as a witness, to take the stand and give testimony; his refusal was later conditioned upon a request for time to "make a few remarks," but he did not at any time inform the Committee of his desire to state legal objections to the jurisdiction of the Committee. Testimony given at the trial by the Committee Chairman and the Committee's chief investigator showed that appellant conveyed the impression he would consume much more than the 3 minutes he requested if he were allowed time for preliminary remarks, since he held what appeared to be a lengthy mimeographed statement, which was later distributed to the press as appellant left the hearing room. Appellant's request for time to make preliminary remarks was treated in accordance with

Committee procedure; the Chairman promised time for such remarks at the conclusion of Committee questioning. It is important to note that appellant was accompanied to the hearing by his legal counsel, who testified at the trial that she was familiar with the course of practice before Congressional investigating committees and had advised appellant, prior to his appearance before the Committee, regarding hearing procedure.

The profession of good faith by appellant regarding his refusal to comply with the demands of the Committee avails him nothing since there was ample evidence to demonstrate that his refusal was deliberate and intentional, which is sufficient to constitute a violation of the statute involved here. *Fields* v. *United States*, 82 U. S. App. D. C. ——, 164 F. 2d 97 (1947), *cert denied*, 332 U. S. 851 (1948). A person summoned to appear before a Congressional committee may refuse to answer questions and submit to a court the correctness of his judgment in doing so, but a mistake of law is no defense, for he is bound to rightly construe the statute involved. *Townsend* v. *United States, supra*. Had appellant taken the oath and submitted to interrogation, in orderly fashion and in conformity with the rules and practices of the Committee (applicable to citizens and aliens alike), he could properly raise the question at any time as to whether the Committee, by any particular inquiry directed to him, was then actually exceeding proper constitutional limitations. *Sinclair* v. *United States, supra; McGrain* v. *Daugherty, supra; In re Chapman*, 166 U. S. 661, (1897); *Kilbourn* v. *Thompson*, 103 U. S. 168 (1880). Appellant could not impose his own conditions upon the manner of inquiry, and the trial court rightly instructed the jury to that effect.

The request made of the appellant by the Committee Chairman that he should be "sworn in" was the usual practice preceding testimony by a witness. Appellant's replies show he explicitly acknowledged the request as nothing more than that, and that his refusal to be sworn as a witness effectively constituted a refusal to give testimony, except upon conditions which he was not entitled to interpose. We think the indictment[8] sufficiently stated an offense, and find no solid ground for the contention advanced that if this indictment be upheld then one who for conscientious scruples insisted on affirming rather than swearing could likewise be indicted and convicted, since the indictment does not negative a willingness to affirm. Rule 7 (c) of the Federal Rules of Criminal Procedure requires only that the indictment contain "a plain, concise and definite written statement of the essential facts constituting the offense charged." The indictment returned in this case sufficiently met that requirement, and there was no attempt to prosecute appellant for refusing to take an oath, except insofar as that act represented refusal to give testimony before the

[8] The indictment, after citing the authority for the creation of the Committee, charged:

"Gerhart Eisler, having been summoned as a witness by the authority of the House of Representatives, through its Committee on Un-American Activities, to give testimony before the said Committee at its session within the District of Columbia on February 6, 1947, upon matters of inquiry committed to said Committee by Public Law No. 601, Section 121, and aforesaid Resolution 5, did appear before the said Committee, on February 6, 1947, and was directed to be sworn to testify upon said matters, and the said Gerhart Eisler thereupon failed and refused so to be sworn to testify, and thereby on February 6, 1947, within the District of Columbia, willfully did make default."

Committee. There was no objection raised by appellant to his taking an oath; indeed, appellant expressly stated his willingness to take an oath if the Committee would accede to the conditions he sought to impose.

It is further contended on behalf of appellant that he appeared before the Committee in the status of an interned enemy alien and as such could not be required to give testimony on any matter of consequence to the Committee. But the arrest of appellant by security officers of the Immigration and Naturalization Service did not nullify the subpoena previously issued in a lawful manner by the Committee. And if the detention of appellant amounted to internment and hence clothed him with the protection of Article 5, *Geneva Convention on Prisoners of War*,[9] we cannot indulge the presumption that the Committee would violate whatever rights were secured to appellant by virtue of Article 5.[10] Appellant, by his conduct before the Committee, refused to be sworn or to answer any questions whatsoever, and is thereby precluded from enjoying the benefit of what force there might be in this argument. "The mere possibility that the power of inquiry may be abused 'affords no ground for denying the power.'" *Barsky* v. *United States*, *supra*, 167 F. 2d 241, 250, citing *McGrain* v. *Daugherty*, 273 U. S. 135, 175 (1927).

Appellant contends that he did not receive a fair trial, raising the contention initially on the basis of the entire record, which we have carefully examined, although we do not sanction such a general averment. As a result of that examination we conclude that appellant did receive a fair trial. The specific averments of hostility and bias on the part of the trial judge set forth by appellant actually indicate, in our opinion, proper attempts to confine the trial of the case to the pertinent issues presented. Defense counsel persistently attempted to adduce immaterial and irrelevant evidence, and the fact that a great number of rulings adverse to appellant were naturally elicited from the trial court contributes nothing to an assertion of hostility and bias. The judge is invested with authority to control the trial procedure, and it is his duty to restrict the evidence to the issues of the case. The collateral contention that the trial judge unduly intervened in the examination and cross-examination of witnesses evokes restatement of a portion of this court's opinion in *Griffin* v. *United States*, 82 U. S. App. D. C. ——, ——, 164 F. 2d 903, 904: "... few rules are better settled, so far as the federal courts are concerned, than the right of a trial judge to make proper inquiry of any witness when he deems that the end of justice may be served thereby and for the purpose of making the case clear to the jurors." There was no violation of that right in the trial below; we find no instance among those complained of where the trial judge's intervention in the questioning by counsel was improper or not obviously calculated to make the case clear to the jurors.

Our review of the record in this case has failed to disclose compelling reasons for reversing the judgment of the District Court. Accordingly, the judgment is affirmed.

Affirmed.

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[9] 47 STAT. 2030 (1929).

[10] Article 5 contains the following provision: "No coercion may be used on prisoners to secure information relative to the condition of their army or country. Prisoners who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind whatever." 47 STAT. 2031 (1929).

PRETTYMAN, J., *dissenting:*

I disagree with my brethren and, because of the nature of the case, think I should state the critical points upon which I would reverse the judgment below:

I

I think that the affidavit of bias and prejudice filed by the appellant in the trial court was sufficient under the statute to require the disqualification of the judge to whom it was addressed, and that the affidavit was filed in time.

The affidavit says:

> "b) . . . . At a hearing of the Un-American Activities Committee on February 6, 1947, out of which this very cause arose there was placed into the record a statement of J. Edgar Hoover, director of the Federal Bureau of Investigation which was allegedly a report of an investigation of my activities by the Federal Bureau of Investigation over many years. Moreover, this report is set forth in full at pages 11-12 of the Committee hearings of February 6, 1947. This report indicates strong personal bias and prejudice against me. During the period of the investigation and until his elevation to the bench in September, 1945, Justice Holtzoff acted as special assistant to the Attorney General assigned to the Federal Bureau of Investigation. His duties were concerned especially with the investigation by the F.B.I. into the activities of aliens and communists, into both of which categories I fall. . . .
>
> "d) In connection with his duties as United States attorney assigned to the F.B.I., Justice Holtzoff advised J. Edgar Hoover as to steps and actions to be taken against alien communists, such as myself. . . .
>
> "e) . . . . Justice Holtzoff was legal advisor to the F.B.I. at the time the investigation of me was commenced and continued as such until September, 1945. Upon information and belief, he figured in an important capacity in advising and aiding and determining the policy, nature, scope and objectives of the investigation directed against aliens and communists, which necessarily included myself."

In sum, the affidavit says that prior to his elevation to the bench the trial judge had been the active legal advisor to the investigator in the very investigation out of which this case arose, which investigation involved this appellant, among others.

The statute is quite succinct and clear:

> "Whenever a party to any action or proceeding, civil or criminal, shall make and file an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against him or in favor of any opposite party to the suit, such judge shall proceed no further therein . . . ."[1]

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[1] 36 STAT. 1090 (1911), 28 U. S. C. A. § 25 (1927).

It is established that upon the filing of an affidavit under this statute the court may determine the legal sufficiency of the affidavit upon the facts as stated but may not give any consideration to the truth or falsity of the alleged facts; the alleged facts must be assumed to be true.[2]

So the simple question here is whether the fact that the trial judge had been the active legal advisor to the investigator in the very investigation which gave rise to the indictment of the defendant, is legally sufficient as a basis for a belief of personal bias. I think it clearly is.

In *Barsky* v. *Holtzoff*[3] we held almost identical allegations to require the disqualification of the judge. This case is not like *Lawson* v. *Curran*,[4] in which there was merely a general allegation that the judge had prosecuted cases involving similar offenses.

Many able and conscientious lawyers and judges—and the trial judge here involved is certainly both—have a deep and abiding conviction of their own abilities to prosecute impersonally and to judge impersonally, and to do both in the same case. But such psychological detachment is not so well established that a belief to the contrary is unreasonable. That a judge has been the prosecutor in the early stages of a particular case against a particular individual is a fact "from which a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge." *Hurd* v. *Letts*, 80 U. S. App. D. C. 233, 234, 152 F. 2d 121, 122 (1945). In the case just cited, this court established that test for disqualification.[5] The statute says "bias or prejudice", evidently meaning to include bent of mind as well as aggressive antipathy.

The statute[6] speaks of filing ten days before the term of court, but that provision was designed for district courts which have periodical terms and in which the identity of the trial judge is known well in advance. In this jurisdiction, the District Court consists of twelve judges who serve in rotation, or upon assignment, in the several branches of the court. The court is in continuous session, except for the summer. Thus, the name of the trial judge may not be known until shortly before the trial; as a matter of fact, several different methods of assigning criminal cases for trial have been experimented with in recent years. It is settled that in this jurisdiction the ten-day provision of the statute is impractical in application and, instead, the rule of "due diligence"[7] must be applied. This is permissible under the clause of the statute which excepts from the ten-day requirement cases in which "good cause shall be shown for the failure to file it within such time."

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[2] Berger v. United States, 255 U. S. 22, 65 L. Ed. 481, 41 S. Ct. 230 (1921); Scott v. Beams, 122 F. 2d 777, 788 (C. C. A. 10th 1941), and cases cited; Mitchell v. United States, 126 F. 2d 550 (C. C. A. 10th 1942).

[3] Misc. No. 126, U. S. App. D. C., June 11, 1947 (petition for mandamus granted).

[4] Misc. No. 142, U. S. App. D. C., April 13, 1948 (petitions for mandamus and for leave to file petition for writ of prohibition denied).

[5] Upon the general subject, *see* Frank, *Disqualification of Judges*, 56 YALE L. J. 605, 626 *et seq.* (1947).

[6] *Supra* note 1.

[7] While not expressly recited as "due diligence", this has been the doctrine underlying cases such as *Hurd* v. *Letts*, *supra*, and *Laughlin* v. *United States*, 80 U. S. App. D. C. 191, 151 F. 2d 281 (1945).

11

Appellant and his counsel first knew on May 20, 1947, of the assignment of this case to Judge Holtzoff for trial.[8] Appellant was in New York. His principal attorneys were in Washington. On that same day he inquired of them whether he was obliged to go to trial before Judge Holtzoff, in view of the judge's previous connections with the F.B.I. Counsel arranged to discuss the matter in Washington on May 23rd. They did so, but the principal counsel received a wire during that morning announcing the sudden death of his brother. This disrupted the conference, and, as a matter of fact, on that basis the court continued the trial to June 4th. The affidavit was finally executed in New York on May 28th and was filed here on May 29th. The trial was actually begun on June 4th.

It seems to me that under the foregoing circumstances the filing of the affidavit nine days after the identity of the trial judge was ascertained came within "due diligence". There was an unforeseeable and unavoidable interruption during those nine days. The affidavit was filed six days before the trial, and other judges were available so that the trial would not have been delayed. Affiant could well have known that with twelve active judges on this District Court, no delay in trial would result from the disqualification of one of them. Moreover, these affidavits should be prepared with the utmost care and certainty as to the facts. The courts should encourage careful consideration and deliberation on the part of counsel. It seems to me to be a grave mistake to hold that such affidavits must be filed almost instantaneously after the identity of the trial judge is ascertained. Such a rule will almost make mandatory the filing of the affidavit without deliberate and careful consideration of counsel. The rule ought to be that they be filed with the utmost deliberation consistent with the undelayed dispatch of the business of the court.

II

I think the court erred in refusing to permit appellant to prove what he intended to say to the Committee when he asked for three minutes before being sworn.[9]

Appellant was convicted of violation of Section 192, Title 2, of the United States Code.[10] That statute is in two parts.[11] The first relates to a person who having been summoned as a witness "upon any matter under inquiry" before a committee of Congress, "willfully makes default". The second part refers to a person who, having appeared as a witness, "refuses to answer any question pertinent to the question under inquiry". The indictment against appellant

[8] Appellee Government says that the date is not shown in the record but says that appellant "concedes" and "admits" that it was "about" May 20th.

[9] The Government says that appellant was permitted to answer, but the record, at pages 133 to 135 of the printed appendix before us, shows plainly that he was not, and his proffer of proof was denied. The denial was repeated (pages 138, 139 and 149 of the appendix). The Government also attempts to show that in the requested three minutes appellant intended to attempt to read a 20-page mimeographed statement, but the evidence is perfectly clear that that statement was prepared to be read after the witness had testified, and contemplated that he would have been sworn. The proffer of proof indicated that he also had a few written notes, relating to legal objections, which he intended to use in the three minutes.

[10] R. S. § 102 (1857), as amended, 52 STAT. 942 (1938).

[11] United States v. Murdock, 284 U. S. 141, 76 L. Ed. 210, 52 S. Ct. 63 (1931).

charged that, having been summoned as a witness to give testimony before the Committee "upon matters of inquiry committed to said Committee . . ., [he] did appear before the said Committee . . . and was directed to be sworn . . . and . . . thereupon failed and refused so to be sworn to testify, and thereby . . . willfully did make default." Thus, the indictment was for willfully making default. "Willfully" in this statute means deliberately or intentionally.[12]

The Chairman of the Committee evaded answering the questions of defense counsel as to the procedure which the Committee had established in respect to the notation of legal objections, but the plain inference of his testimony is that the established procedure was to allow a witness to make his legal objections before being sworn. The purport of appellant's offer of proof was that he had intended to interpose legal objections to being compelled to testify. That proffer must be viewed in the setting of the Committee hearing. The testimony of the Committee Chairman was that the Committee room was "jammed packed with people", and the chief investigator of the Committee testified that there were quite a few photographers present taking photographs. The entire colloquy, which takes a little less than two pages of print, could hardly have taken more than a few minutes. It is true that appellant did state that he was not going to take the stand and refused to be sworn, but he said twice, "I am ready to answer all questions," and twice he said, "I do not refuse to be sworn." Twice he said that he wanted to speak before he was sworn, and twice he quite definitely said that he wanted only three minutes.

If it was the established practice that legal objections be stated by the witness before he was sworn, and if appellant could prove that all he wanted to do was to state his legal objections and thereafter be sworn and "answer all questions", I do not see how he could be held guilty of "willful" default. While bad faith is not an element of willfulness, intent is. Appellant was entitled to prove that he had no intent to refuse to testify but merely wanted to follow the established practice.

The trial court made some reference to appellant's position being that he wished to impose conditions upon his testifying, but I see no merit in that suggestion, if, as a matter of fact, appellant was merely attempting to comply with the established procedure.

III

I also think that judgment of acquittal should have been directed on the ground that the Government failed to prove that appellant was summoned to testify in a matter of inquiry submitted to the Committee by the Congressional Resolution. This record does not show, and we do not yet know, what it was that the Committee wanted appellant to testify about. The subpoena merely directed the marshal to summon him "to testify touching matters of inquiry committed to said Committee"; it did not describe or name any such matter. He was not told by anybody, so far as the record shows, what the matters were concerning which he was to testify. There is no shred of evidence that he was summoned as a witness upon a matter under inquiry before the Committee, but the statute requires that he must have been summoned upon such a matter. The necessity of proof on the

[12] Fields v. United States, 82 U. S. App. D. C. ——, 164 F. 2d 97, 100 (1947).

point seems to me to be an unavoidable conclusion from the constitutional principles laid down in *Kilbourn* v. *Thompson*,[13] *McGrain* v. *Daugherty*,[14] and *Sinclair* v. *United States*.[15]

The Government says that *Josephson* v. *United States*[16] disposes of this point. But it does not. The Second Circuit was exceedingly meticulous about it. Josephson was not indicted for default; he was indicted, under the second part of the statute, for refusing to answer pertinent questions. Therefore, the court held, expressly and carefully, that no question of wilfulness was involved and that the refusal to answer any question was a refusal to answer any pertinent question. We do not have that situation here.

IV

I do not share the view of my brethren in respect to the general conduct of the trial. It is not possible in the short space of an opinion to relate all the incidents which occurred during the course of the trial, and severally and alone they might not constitute ground for reversal, but, when coupled with the considerations already discussed, they make certain the necessity of reversal, in my opinion.

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[13] 103 U. S. 168, 26 L. Ed. 377 (1881).

[14] 273 U. S. 135, 71 L. Ed. 580, 47 S. Ct. 319 (1927).

[15] 279 U. S. 263, 73 L. Ed. 692, 49 S. Ct. 268 (1929).

[16] 165 F. 2d 82 (C. C. A. 2d 1947).

[fol. 246] [Stamp:] United States Court of Appeals for the District of Columbia. Filed June 14, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9582

GERHART EISLER, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the District of Columbia

Before: Clark, Prettyman and Proctor, JJ.

JUDGMENT

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Clark.

Dated June 14, 1948.

Dissenting opinion by Mr. Justice Prettyman.

[fol. 247] [Stamp:] United States Court of Appeals for the District of Columbia. Filed June 19, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 9582

GERHART EISLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

PETITION FOR REHEARING

Comes now the appellant by his counsel and petitions for a rehearing in the above-captioned case on the following grounds:

1. The majority opinion states "that it was customary procedure to allow witnesses to state legal objections to the jurisdiction of the Committee before they were required to be sworn." Accordingly, if all the appellant wished to do was to make a legal objection before being sworn, he could not be found guilty. Since appellant was entitled under the constitution to a trial by jury, under the majority opinion, appellant was entitled to have the jury decide whether he wished to make a legal objection.

But the trial court did not permit the jury to decide the issue. The trial court excluded evidence on this point (J.A. 122, 126, 133, 134, 135, 138, 139, 146, 149, 150); refused to charge the jury that the appellant should be acquitted, if he wished only to make a legal objection (J.A. 180), and in essence instructed the jury that the defendant did not wish to make a legal objection but instead refused to be sworn (J.A. 173, 177).

[fol. 248] Thus, the issue at this stage is not, as the majority opinion would appear to indicate, whether there was evidence to support a jury decision that the appellant did not wish to make a legal objection. The issue is rather whether the appellant was denied an opportunity to prove his contention and have the jury pass on it. Clearly, if, as the majority opinion holds, the appellant was entitled to make a legal objection before being sworn, then he was

entitled to have the jury decide the fact as to whether or not he was making such legal objection. The refusal by the trial court to permit the jury to pass on the facts was a denial of due process and of trial by jury as guaranteed by the Fifth and Sixth Amendments to the Constitution.

2. The majority opinion rightly holds "that either House of Congress has power to issue process to compel private individuals to appear and give testimony *in aid of the legislative function.*"[1] Clearly, therefore, one charged with contempt of Congress is entitled to defend on the ground that he was not summoned to give testimony in aid of the legislative function. But this right was denied the appellant by the trial court, when the court refused to permit proof that the appellant was not summoned to give testimony in aid of the legislative function, but for other purposes beyond the power of Congress. (J.A. 101, 102, 104, 119, 120). This is not a question of scrutinizing the motives of Congress or one of its committees as assumed by the majority opinion. It is simply a question of the clear right of the appellant to prove as a defense that the committee was not acting in aid of a legislative function, but was acting [fol. 249] beyond the powers granted to Congress by the Constitution. This error in denying to appellant the opportunity to prove that he was not summoned to testify in aid of the legislative function was further compounded by the failure, as pointed out by the dissent, of the Government to prove that he was summoned to testify on a matter under inquiry by the committee.

3. The majority opinion did not discuss or consider the case of *Barsky* v. *Holtzoff*, decided by this Court unanimously on June 11, 1947. Yet the majority opinion is squarely in conflict with the decision in that case. A reading of the record in that case indicates that it should be controlling in this case and in fact was so considered by Justice Prettyman who was the only member of this court who sat on that case.

4. The majority opinion did not consider the contention that the trial court erred in refusing to permit appellant to prove what he intended to say to the Committee when he

[1] Italics supplied.

asked for three minutes before being sworn (brief, at p. 39). Although not considered at all by the majority, this contention was considered sufficiently important by the dissent to require reversal.

5. The majority opinion did not consider the contention that the Government failed to prove that appellant was summoned to testify in a matter of inquiry submitted to the Committee by Congress (brief, at p. 46; reply brief, at p. 10). Although not considered at all by the majority, this contention was considered sufficiently important by the dissent to require a judgment of acquittal.

6. The majority opinion did not consider the contention that the trial court erred in that it made inconsistent rulings on evidence prejudicial to the appellant. The tria court [fol. 250] allowed the prosecution to examine on and argue concerning certain subjects, while denying to the defense the opportunity to introduce evidence thereon. (brief, pp. 29-30). For example, the majority opinion considered it important to note that appellant was accompanied by legal counsel, but did not comment on the refusal of court to permit testimony to the effect that counsel had instructed appellant to make his own legal objection, since under committee practice counsel would not be permitted to speak (J.A. 107, 146, 149, 150).

7. The majority opinion did not consider the contention that the trial court erred by refusing to permit defense counsel to object to the trial court's charge out of the hearing of the jury, in violation of Rule 30 of the Rules of Criminal Procedure (brief, at p. 31; reply brief, at pp. 6-7).

8. The majority opinion did not consider the contention that the trial court erred in that its charge was equivalent to directing a verdict of guilty (brief, pp. 37-38; reply brief, p. 8).

9. The majority opinion did not consider the contention that the trial court erred by refusing requested charges to the effect that the jury should acquit if it found that the appellant had merely attempted to make a legal objection to the Committee's requiring him to be sworn and to testify (brief, pp. 39-40; reply brief, pp. 8-9).

We respectfully submit that all of these considerations require a rehearing by the Court and we request oppor-

tunity to argue orally on the questions raised in this petition.

David Rein, Abraham J. Isserman, Attorneys for appellant.

[fol. 251] Certification of Service

I hereby certify that I have served the within and foregoing Petition for Rehearing in the above entitled cause upon William Hitz, Assistant United States Attorney, by enclosing a true and correct copy thereof and depositing the same in the United States mails at Washington, D. C., on June 19th, 1948.

David Rein, Attorney for Appellant, 1105 K Street N.W., Washington, D. C.

[fol. 252] [Stamp:] United States Court of Appeals for the District of Columbia. Filed July 17, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9582

GERHART EISLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

Before Clark, Prettyman and Proctor, JJ

ORDER

On consideration of appellant's petition for rehearing herein, It is

Ordered by the Court that the petition for rehearing be, and it is hereby, denied.

Per Curiam.

Dated July 17, 1948.

[fol. 253] [Stamp:] United States Court of Appeals for the District of Columbia. Filed August 24, 1948. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, APRIL TERM, 1948

No. 9582

GERHART EISLER, Appellant,

v.

UNITED STATES OF AMERICA, Appellee

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint appendix to brief.
2. Opinion.
3. Judgment.
4. Petition for rehearing.
5. Order denying petition for rehearing.
8. This designation.
9. Clerk's certificate.

David Rein, Attorney for Appellant.

Certification of Service

I hereby certify that I have served the within and foregoing Designation of Record in the above-entitled cause upon William Hitz, Assistant United States Attorney, by enclosing a true and correct copy thereof and depositing the same in the United States mails at Washington, D. C., on August 24, 1948.

David Rein.

[fol. 254] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1 to 253, both inclusive, constitute a true copy of the joint appendix to the briefs of the parties and of the proceedings of the said Court of Appeals as designated by counsel for appellant in the case of: Gerhart Eisler, Appellant, vs. United States of America, Appellee, No. 9582, April Term, 1948, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this thirty-first day of August, A. D. 1948.

Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia. By C. Preston Gainor, Assistant Clerk. (Seal.)

[fol. 255] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

GERHART EISLER, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 1st, 1948.

Fred M. Vinson, Chief Justice of the United States.

Dated this 2nd day of August, 1948.

[fol. 256] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 8, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton took no part in the consideration or decision of this application.